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No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking

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ARTICLES

No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking

CHARISA SMITH*

Pimps and johns who sexually exploit children garner instant public and scholarly outrage for their lust for a destructive “quick fix.” In actuality, many justifiably concerned scholars, policymakers, and members of the public continue to react over-simplistically and reflexively to the issue of child sex trafficking in the United States—also known as commercial sexual exploitation of children (CSEC)—in a manner intellectually akin to immediate gratification. Further, research reveals that the average john is an employed, married male of any given race or ethnicity, suggesting that over-simplification and knee-jerk thinking on CSEC are conspicuous. This Article raises provocative questions that too many others have avoided, while addressing a topic of immense public interest. CSEC occurs in all 50 states and is estimated to be a \$290 million industry in Atlanta alone. The explosion of media attention, high-profile scandals, and sexualized popular culture have put CSEC front and center in law and policy. However, the dominant discourse and policymaking on CSEC rely on criminal law

* William Hastie Fellow, University of Wisconsin Law School. Yale Law School, J.D. Thanks to Mark Sidel, William Rhee, Karen Bravo, Aziza Ahmed, Jennifer Lynne Musto, Mariela Oliveras, Nancy Leong, Barbara Bennett Woodhouse, Blanche Bong Cook, Ummni Khan, Rana Jaleel, and the survivor-led team at Girls Education and Mentoring Services (GEMS). Gratitude to Justin Hamano for research assistance.

as a quick fix. Scholars in law, social science, and public health have begun joining CSEC survivors and advocates in critiquing criminal law for its ineffectiveness and its dubious expansion of mass incarceration and survivor victimization. Yet, the discourse, law, and policy remain highly flawed. This Article bridges the gaps in crucial ways.

This Article addresses a controversial and fundamental matter: that many CSEC survivors resist “rescue” efforts and narratives, while decrying the pitfalls of criminal, child protective, and public health responses alike. After discussing the pronounced failure of criminal law, the socio-cultural and economic roots of CSEC, and feminist, critical race, and Vulnerability Theory implications, this Article concludes that youth agency is a key, missing element of the socio-legal response to CSEC. This Article traces the history of children’s consent to sex in U.S. law and incorporates scientific findings cited in recent U.S. Supreme Court jurisprudence.

Evidence suggests that civil law remedies for CSEC are an essential, redistributive, under-utilized tool that engenders sorely needed youth agency and adult offender deterrence. Civil law remedies for CSEC address most sharp critiques of criminal, child protective, and public health responses, while incorporating the “capabilities approach”¹ that Nobel Prize-winning economist Amartya Sen and feminist philosopher Martha Nussbaum first coined—now prominent in public policy and political philosophy. However, there is still no “quick fix” for the complex, deep-seated CSEC crisis. Future responses require survivor leadership, multi-sector collaboration, and nuanced scholarly research. A continued rush to punish demonized “bad actors” or to

¹ Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1455 (2011) (citing Amartya Sen, Drummond Professor of Political Econ. at Oxford Univ., *Equality of What?: The Tanner Lecture on Human Values* at Stanford University 198, 218–19 (May 22, 1970), http://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf; AMARTYA SEN, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 30–33 (Martha C. Nussbaum & Amartya Sen eds., 1993); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 4–15 (Cambridge Univ. Press 2000).

carcerally protect children will only exacerbate the problem while ignoring the link between CSEC and prevalent sexual violence and oppression in the most intimate—and seemingly innocuous—parts of U.S. society.

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INTRODUCTION

The over-simplistic and reflexive response to child sex trafficking in the United States—also known as commercial sexual exploitation of children (CSEC)—has become a “quick fix” to satiate those concerned but not directly affected by the issue. This paper challenges the dominant discourse and policymaking on CSEC, which rely on criminal law despite significant evidence of its ineffectiveness and its dubious expansion of mass incarceration and survivor victimization.

Commentators continue to evade the reality that many youths involved in CSEC neither wish to “escape” nor be “rescued” in the ways that most reformers perceive them, and that existing criminal law and social service responses to CSEC tend to ignore each child’s voice. While scholars and advocates openly debate the decriminalization of adult sex work and assert sex workers’ rights as human rights, invoking the dignity of agency and choice, they fail to acknowledge the similar, yet distinct conundrum involved in CSEC. Just as criminal law responses to CSEC are problematic, most alternatively proposed child protective responses are paternalistic; and even longer-term, yet potentially effective public health responses fall short. Although there is no quick fix for the complex and deep-seated CSEC crisis, future responses must account for survivor resistance and youth agency in meaningful ways, while confronting the structural roots of the problem.

This Article addresses critical concerns and recommends promising civil law remedies as a way to engender sorely needed survivor agency and offender deterrence in the response to CSEC. Civil law remedies for CSEC importantly incorporate the “capabilities approach”² that Nobel Prize-winning economist Amartya Sen and feminist philosopher Martha Nussbaum first coined. Unlike other approaches to CSEC, civil law remedies equip survivors with the agency, tools, and resources they need to actually choose and alter their life paths—an essential element of the “capabilities approach,” which is now a prominent concept in public policy and political phi-

² Cavalieri, *supra* note 1, at 1455; Sen, *supra* note 1, at 30–33; NUSSBAUM, *supra* note 1, at 4–15.

losophy. Civil law remedies can better address sharp feminist, critical race, and Vulnerability Theory critiques of existing responses to CSEC in the criminal, child protective, and public health arenas.

Part I of this Article begins by describing the definition, magnitude, and legal landscape of CSEC in the U.S., acknowledging critiques of CSEC measurement. Part II joins scholarly critiques of the dominant criminal law response to CSEC, which have neither decreased the demand for trafficked children, nor reduced the supply. Part II asserts that the criminal law focus on punishment of traffickers and buyers (johns) as “bad actors,” and the “carceral protection” of young survivors misdirects resources and perpetuates harm. Part II further asserts that a continued rush to punish demonized offenders will exacerbate the problem, while ignoring the link between CSEC and prevalent sexual violence and oppression in the most intimate and seemingly innocuous parts of U.S. society—such as university campuses, private homes, and religious organizations.

Part III explores the theoretical dimensions of CSEC, addressing a gap in the theoretical discourse by combining feminist theory, critical race feminism, and Vulnerability Theory. While scholars have used these theoretical frames to analyze CSEC in piecemeal fashion, their analyses have not gone far enough; full acknowledgment of youth agency has been missing. Part IV then wrestles with a crucial question: who is the “child” in CSEC? Part IV addresses largely unanswered questions in the literature regarding whether children can consent to sex work or to sex with adults on any level, and whether youth agency is a necessary part of a socio-legal response to CSEC. After tracing the history of youth consent to sex, and sexual exploitation in the U.S., Part IV ultimately evaluates the psychological underpinnings of childhood and the needs of CSEC survivors, concluding that youth agency is essential to resolving the CSEC conundrum. Part IV includes groundbreaking discussion of juvenile neuroscience research cited in recent Supreme Court jurisprudence. Part V then explains promising developments in civil law remedies for CSEC, which can better address the complex, structural roots of CSEC by empowering youth, redistributing resources, and deterring adult exploiters. Part V points to civil law remedies as a vastly under-utilized tool, and a missing link in both the CSEC discourse and the socio-legal response. The paper concludes by encouraging scholars and policymakers to continually challenge their knee-jerk

assumptions about sexual violence, socio-economic oppression, and youth incapacity.

I. THE PROBLEM OF DOMESTIC CHILD SEX TRAFFICKING

A. Definitions and Legal Landscape

The definition of CSEC herein will refer to children performing paid sex (prostituted), being used in pornography, or participating in exotic dancing or other sexually-related industries primarily (but not exclusively) for others' financial gain. A child or youth will be defined as a person under age 18, per the American Psychological Association's standards and as the most commonly applied legal age of majority.³ While there is some debate over whether all CSEC amounts to child sex trafficking, and much debate about whether adult sex work can be conflated with sex trafficking, the terms CSEC and child sex trafficking will be used interchangeably here.⁴ A majority of federal agencies and advocacy groups interchange the terms, and there is no longer a legal requirement that movement or transportation of a child be involved for sexual exploitation of a child to amount to trafficking.⁵

³ TASK FORCE ON TRAFFICKING OF WOMEN AND GIRLS, REPORT OF THE TASK FORCE ON TRAFFICKING OF WOMEN AND GIRLS 2 (American Psychological Association 2014), <https://www.apa.org/pi/women/programs/trafficking/report.pdf>.

⁴ See, e.g., KEVONNE SMALL ET AL., URBAN INST. JUSTICE POLICY CTR., AN ANALYSIS OF FEDERALLY PROSECUTED COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (CSEC) CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 app. A-2 (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411813-An-Analysis-of-Federally-Prosecuted-Commercial-Sexual-Exploitation-of-Children-CSEC-Cases-since-the-Passage-of-the-Victims-of-Trafficking-and-Violence-Protection-Act-of--.PDF>; Aziza Ahmed, *Think Again: Prostitution*, FOREIGN POL'Y, Jan./Feb. 2014, at 74, 77; Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 545, 554–61 (2009).

⁵ ELLEN WRIGHT CLAYTON, ET AL., CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES: A GUIDE FOR THE LEGAL SECTOR 5–7 (Rona Briere & Patti Simon eds., Inst. of Med. & Nat'l Research Council 2013), <http://www.nationalacademies.org/hmd/~media/Files/Resources/SexTrafficking/guideforlegalsector.pdf>; THE U.S. DEP'T OF JUSTICE, CITIZEN'S GUIDE TO U.S. FEDERAL LAW ON THE PROSTITUTION OF CHILDREN (last updated July 6, 2015); ECPAT INT'L, WHAT IS COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN? DEFINITIONS FOR YOUNG PEOPLE (2008),

Both national and international legislation and standards recognize that children under age 18 with involvement in the sex trade are victims of sex trafficking or CSEC; importantly, children are given this definition regardless of whether they self-identify as victims of trafficking and regardless of whether they admit some form of force, fraud, or coercion by another individual.⁶ The relevant U.S. federal law is the Trafficking Victims Protection Act, which identifies children involved in prostitution as victims of “severe forms of trafficking.”⁷ Internationally, the United Nations Protocol for the Prevention, Protection and Prosecution of Trafficking in Persons, Especially Women and Children (Palermo Protocol), includes the prostitution of children under age 18 as trafficking.⁸

In the last few decades, U.S. states have begun to more closely conform with the federal and international definitions of CSEC by adopting “safe harbor” laws that provide a child-protective response to child prostitution and grant full prosecutorial immunity to sexually exploited children.⁹ Currently, at least twenty-eight states have

http://www.ecpat.org/wp-content/uploads/2016/04/Child_Friendly_Def_ENG.pdf; *Research & Resources: Facts About Commercial Sexual Exploitation of Children (CSEC) and Domestic Trafficking*, GEMS, <http://www.gems-girls.org/about/research-resources> (last visited Jul. 30, 2016).

⁶ Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 210–11 (2015).

⁷ Trafficking Victims Protection Act of 2000 § 103, 22 U.S.C. § 7102(9) (2012).

⁸ G.A. Res. 55/25, annex I, article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 10, 2000), <http://www.un-documents.net/uncatoc.htm> (noting “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’” and “[c]hild’ shall mean any person under 18 years of age.”).

⁹ See Dempsey, *supra* note 6, at 211; POLARIS, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR (Fall 2015), <http://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf> (noting that “safe harbor” laws prevent minor victims of sex trafficking from being prosecuted for prostitution and protect child victims of sex trafficking by providing them with specialized services); see also *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010) (holding that a child could not be prosecuted for prostitution because a child could not legally consent to sex); Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL’Y 255, 282–83 (2014).

enacted some version of safe harbor laws.¹⁰ While eighteen states prohibit criminalization of CSEC victims, thirty-two states (and Washington, D.C.) still arrest children for prostitution and either adjudicate them as delinquents or process them in the adult criminal justice system.¹¹ Notably, this disparate state response exists despite the fact that most youth under age 18 cannot legally consent to sex with an adult, and would be victims of statutory rape under those same state legal systems.¹² In states that prosecute children for prostitution, there is a presumption of a child's consent to a commercial sex act.¹³ Several state laws require proof of force, fraud, or coercion (FFC) in order to rebut the presumption of a child's consent to commercial sex.¹⁴ Yet, most anti-trafficking advocates and human rights entities find the FFC requirement to be highly inappropriate and abusive.¹⁵ The international human rights and humanitarian commu-

¹⁰ NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE INTENT OF "SAFE HARBOR LAWS" (2014).

¹¹ Dempsey, *supra* note 6, at 211–12.

¹² See *id.* at 211; ELLEN WRIGHT CLAYTON ET AL., INST. OF MED. & NAT'L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 145–46 (Ellen Wright Clayton et al. eds., 2013); Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1066, 1083–96 (2011); AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 190 (2012).

¹³ Cheryl Nelson Butler, *Kids for Sale: Does America Recognize its Own Sexually Exploited Minors as Victims of Human Trafficking?*, 44 SETON HALL L. REV. 833, 839 (2014).

¹⁴ *Id.* at 839.

¹⁵ See *id.* at 839–41 (citing SHARED HOPE INT'L, DEMANDING JUSTICE PROJECT: BENCHMARK ASSESSMENT 8 (2013), <http://sharedhope.org/wp-content/uploads/2013/11/Demanding-Justice-Project-Benchmark-Assessment-Report-2013.pdf>) ("A persistent confusion exists regarding the agency of a minor engaged in prostitution and that of a minor engaged in consensual sex, frequently resulting in the invocation of age of consent laws when considering heightened penalties for those buying sex acts with a child. This has led to some states using the age of consent laws to draw the line, rather than the age of majority."); see also SHARED HOPE INT'L, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK FOR THE PROTECTION OF THE NATION'S CHILDREN 27 (2013), <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf> ("To ensure identification of sexually exploited children as

nity has declared that the U.S. has not adequately protected children's human rights. Many leaders and scholars are encouraging the U.S. to finally ratify the United Nations Convention on the Rights of the Child, particularly due to its treatment of children in the delinquency and criminal justice systems.¹⁶

B. *The Scope of the Problem, and the Measurement Dilemma*

CSEC within the U.S. has become an issue of escalating public concern in the last few decades, yet the scope of the problem is difficult to measure. CSEC has been found to occur in all fifty states.¹⁷ "Since 2007, the National Human Trafficking Resource Center hotline, operated by the Polaris Project, has received reports of 14,588 sex trafficking cases inside the United States."¹⁸ In calendar year 2014, 84% of the 1,607 reports to the National Human Trafficking Resource Center hotline and Polaris's BeFree Textline involved

victims and to prevent traffickers from escaping criminal liability through manufactured evidence of consent, all minors under the age of 18 should be deemed unable to consent to involvement in commercial sex acts, thus rendering the element of force, fraud or coercion irrelevant in domestic minor sex trafficking cases.").

¹⁶ See Ann Laquer Estin, *Transjurisdictional Child Welfare: Local Governments and International Law*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 595, 602 (2013). See also Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT'L L. & POL. 55, 83–86 (2013); Benjamin Pomerance, *Not Just Child's Play: Why Recognizing Fundamental Principles of the UN Convention on the Rights of the Child as Jus Cogens Would Give Needed Power to an Important International Document*, 16 GONZ. J. INT'L L. 1 (2013). See generally Joy Ngozi Ezeilo (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶ 95–100, transmitted by Note to the General Assembly, U.N. Doc. A/64/290 (Aug. 12, 2009) [hereinafter Ngozi Ezeilo Report I]; U.N. NEWS CENTRE, *UN Lauds Somalia As Country Ratifies Landmark Children's Rights Treaty* (Jan. 20, 2015), <http://www.un.org/apps/news/story.asp?NewsID=49845#.V55fkDVtiyG> (stating that the U.S. is now one of only two nations in the world that has not ratified the U.N. Convention on the Rights of the Child. The other is South Sudan).

¹⁷ See *Sex Trafficking*, POLARIS, <http://polarisproject.org/sex-trafficking> (last visited Aug. 7, 2016).

¹⁸ *Id.*

CSEC.¹⁹ Globally, the International Labor Organization estimates that there are 4.5 million people trapped in forced sexual exploitation.²⁰ The exact number of CSEC survivors²¹ in the United States is unknown because of challenges in defining the population and varying methodologies used to arrive at estimates.²² While a particularly oft-cited study claims that 100,000 to 300,000 children in the U.S. are at risk of involvement in CSEC, this study has been extensively criticized for design and definition flaws, and was last revised in 2002.²³

“In a 2014 report, the Urban Institute estimated that the underground sex economy ranged from \$39.9 million in Denver, Colorado, to \$290 million in Atlanta, Georgia.”²⁴ The value of global human trafficking, which involves both children and adults, is an estimated \$32 billion-per-year industry with tax-free earnings.²⁵ Experts assert that one pimp can make between \$5,000 and \$32,833

¹⁹ *Child Trafficking and the Child Welfare System*, POLARIS, <https://polaris-project.org/sites/default/files/Child%20Welfare%20Fact%20Sheet.pdf> (last visited Sep. 8, 2016).

²⁰ *Forced Labour, Human Trafficking and Slavery*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited Aug. 8, 2016).

²¹ Whenever possible, this paper will use the term “survivors” to describe persons who have experienced CSEC before age 18, as opposed to the term “victims.” Most feminist scholars and advocates agree that “survivors” is a more empowering and respectful term. See Roxanne Krystalli, *The Subjects of Mass Atrocities: Victims or Survivors?*, WORLD PEACE FOUNDATION (Apr. 10, 2014), <http://sites.tufts.edu/reinventingpeace/2014/04/10/the-subjects-of-mass-atrocities-victims-or-survivors/>.

²² See KRISTIN FINKLEA, ET AL., SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 6 (Congressional Research Service 2015), <http://fas.org/sgp/crs/misc/R41878.pdf>; CLAYTON, *supra* note 12, at 42–43.

²³ See, e.g., Maggie McNeill, *Lies, Damned Lies and Sex Work Statistics*, WASH. POST (Mar. 27, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/> (discussing RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO EXECUTIVE SUMMARY (OF THE U.S. NATIONAL STUDY) 20–21 (2001) (rev. 2002) <https://maggiemcneill.files.wordpress.com/2011/04/estes-weiner-2001.pdf>).

²⁴ POLARIS, *supra* note 17.

²⁵ See The United Nations Office of Drugs & Crime, Research & Analysis Section, 2007 *World Drug Report*, 170 (2007) [hereinafter *U.N. 2007 World Drug Report*].

per week tax free.²⁶ A wide range of experts agree that the average age of entry of a child into domestic CSEC is 12–14 years old.²⁷ State-identified survivors of CSEC overwhelmingly identify as female, but the occurrence of CSEC among male youth, and also among lesbian, gay, bisexual, and transgender (LGBT) youth, is under-studied.²⁸

While CSEC is a devastating problem, research increasingly suggests that the media and policymaking frenzy over CSEC may rely on a considerable amount of exaggeration. For example, in 2011, the Texas attorney general asserted that the Super Bowl has become the single greatest human trafficking incident in the United States, with continued arrests of individuals who solicit underage children.²⁹ Super Bowl 2014 subsequently spurred a vast collaboration between local police departments, the Department of Homeland Security, nongovernmental organizations, and technology firm IST International, followed by a much-quoted FBI press release claiming that sixteen youths were “recovered.”³⁰ Yet, those events received scathing scrutiny from providers of legal assistance to CSEC

²⁶ MEREDITH DANK, ET AL., THE URBAN INSTIT., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 30 (2014).

²⁷ LINDA A. SMITH, ET AL., THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 30 (2009), http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

²⁸ See, e.g., Ric Curtis, et al., *The CSEC Population in New York City: Size Characteristics, and Needs*, in THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 1, 115–116 (1 vol. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225083.pdf>; TRAUMA CTR. AT JUSTICE RES. INST., *Surviving Our Struggle: A Program for Boys, Young Men and Trans-Identified Individuals*, <http://www.traumacenter.org/initiatives/SOS.php> (last visited Aug. 1, 2016); Yu Sun Chin, *Trafficked Boys Overlooked*, JUV. JUST. INFO. EXCHANGE (Apr. 14, 2014), <http://jjie.org/trafficked-boys-overlooked-underrepresented/106688/>.

²⁹ Michelle Lillie, *Largest Human Trafficking Incident in America*, HUM. TRAFFICKING SEARCH (Jan. 20, 2014), <http://www.humantraffickingsearch.net/wp1/largest-human-trafficking-incident-in-america>.

³⁰ FBI NATIONAL PRESS OFFICE, *Sixteen Juveniles Recovered in Joint Super Operation Targeting Underage Prostitution*, THE FED. BUREAU OF INVESTIGATION (Feb. 4, 2014), <https://archives.fbi.gov/archives/newark/press-releases/2014/sixteen-juveniles-recovered-in-joint-super-bowl-operation-targeting-underage-prostitution>

survivors in the U.S., researchers on domestic sex trafficking, and international trafficking advocates who argue that no proven link exists between major sporting events and spikes in CSEC or sex trafficking.³¹ The Attorney General of New York, a veteran juvenile judge, and the President and Chief Executive of the U.S. Fund for UNICEF all weighed in to urge the public not to over-simplify or sensationalize CSEC.³² While computer technology, social media, Internet websites like *Craigslist.com* and *Backpage.com*, and myriad media outlets have become proven, controversial, major sources of CSEC, certain scholars critique efforts to surveil children's and alleged offenders' online activities as state overreach threatening personal privacy.³³ Both law enforcement agents and survivor service programs have also become more aware of the increasing role of women and other youth in the perpetuation of CSEC.³⁴ Yet, many youth have deep allegiance, romantic involvement, and family bonds with their exploiters, and the complexity of CSEC cannot be underestimated.³⁵

³¹ JULIE HAM, WHAT'S THE COST OF A RUMOUR? A GUIDE TO SORTING OUT THE MYTHS AND THE FACTS ABOUT SPORTS EVENTS AND TRAFFICKING 14–15 (Global Alliance Against Traffic in Women 2011), <http://www.gaatw.org/publications/WhatstheCostofaRumour.11.15.2011.pdf>; JENNIFER MUSTO, CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES 1–2 (2016); Kate Mogulescu, Op-Ed., *The Super Bowl and Sex Trafficking*, N.Y. TIMES (Jan. 31, 2014), http://www.nytimes.com/2014/02/01/opinion/the-super-bowl-of-sex-trafficking.html?_r=0.

³² See Eric Schneiderman, Letter to the Editor, *The Victims of Human Trafficking*, N.Y. TIMES (Feb. 4, 2014), <http://www.nytimes.com/2014/02/06/opinion/the-victims-of-human-trafficking.html>; Michael Corriero, Letter to the Editor, *The Victims of Human Trafficking*, N.Y. TIMES (Feb. 3, 2014), <http://www.nytimes.com/2014/02/06/opinion/the-victims-of-human-trafficking.html>; Caryl M. Stern, Letter to the Editor, *The Victims of Human Trafficking*, N.Y. TIMES (Feb. 3, 2014), <http://www.nytimes.com/2014/02/06/opinion/the-victims-of-human-trafficking.html>.

³³ Mary Graw Leary, *Fighting Fire With Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 314–20 (2014); Wendi Adelson, *Child Trafficking and the Unavoidable Internet*, 19 SW. J. INT'L L. 281, 285, 294–96 (2013). See also MUSTO, *supra* note 31, at 52.

³⁴ Julie Bindel, *Women Sex Trafficking Other Women: The Problem Is Getting Worse*, THE GUARDIAN (Apr. 22, 2013, 2:00 PM), <https://www.theguardian.com/lifeandstyle/2013/apr/22/women-sex-trafficking-women-problem>.

³⁵ *Id.* (emerging evidence indicates that increasing numbers of female traffickers are involved in the trafficking of minors); POLARIS, *supra* note 17.

II. THE CRIMINAL LAW AS A QUICK FIX

Although dominant governmental responses and scholarly discussion surrounding domestic CSEC have relied upon criminal law, criminal law has been an ineffective, quick-fix approach that has neither eradicated nor diminished supply or demand. Instead, criminal law has exacted increasing funding, attention, and human resources, at the expense of CSEC survivors and communities.

All states and the federal government have criminalized child sex trafficking, and most are increasing jail terms for offenders.³⁶ Criminal prosecutions remain a centerpiece of all federal and state programs to address CSEC, including the FBI's 12-year-long continuing Innocence Lost National Initiative.³⁷ The PROTECT Act of 2003 requires additional mandatory sentences for sex offenders and sex tourists, and amended the criminal code to increase supervision of convicted sex offenders for specific felonies.³⁸ Further, pursuant to the federal Sex Offender Registration and Notification Act (SORNA), most federal and state laws on child trafficking and exploitation create additional classifications of sex offending for traffickers and solicitors of children for sex.³⁹

³⁶ See SHARED HOPE INT'L, PROTECTED INNOCENCE LEGISLATIVE FRAMEWORK: METHODOLOGY 1–4 (2011), https://sharedhope.org/wp-content/uploads/2012/09/SHI_ProtectedInnocence_Methodology_FINAL.pdf (State laws on CSEC vary in terminology and include prohibitions on child sex trafficking, human trafficking with particularly strong penalties for child victims, solicitation or patronizing of a child for sex, corruption of a minor, etc.).

³⁷ Fed. Bureau of Investigation, *Innocence Lost*, FBI: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/investigate/vc_majorthefts/cac/innocencelost (last visited July 28, 2015) (“In the 12 years since its inception, the initiative has resulted in the development of 73 dedicated task forces and working groups throughout the U.S. involving federal, state, and local law enforcement agencies working in tandem with U.S. Attorney’s Offices. To date, these groups have worked successfully to rescue more than 4,800 children. Investigations have successfully led to the conviction of more than 2,000 pimps, madams, and their associates who exploit children through prostitution. These convictions have resulted in lengthy sentences, including multiple life sentences and the seizure of real property, vehicles, and monetary assets.”).

³⁸ 18 U.S.C. § 2252 (2006). See Noreen Muhib and Vivian Huelgo, *Voices for Victims: Lawyers Against Human Trafficking Tool Kit for Bar Associations*, 2016 A.B.A. TASK FORCE ON HUMAN TRAFFICKING.

³⁹ See 42 U.S.C. § 16911(3)(A)(i) (2012); Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*, 20 UPDATE, nos. 9 & 10, 2007, at 1–2,

Scholars have historically contributed to the emphasis on a criminal law approach to CSEC. Much scholarly discourse on CSEC has been marked by outrage and over-simplification.⁴⁰ Some scholars even use battlefield analogies to argue for more stringent terms of incarceration for offenders, casting exploiters and buyers as pure public enemies.⁴¹ At times, scholars mention organized crime and public corruption as overlooked elements of CSEC;⁴² and discussion of the role of businesses, such as hotels, has until recently been limited to ways that businesses can cooperate with law enforcement on identification, awareness, arrests, and prosecutions.⁴³

While the Protected Innocence Initiative (the Initiative) by Shared Hope International—a comprehensive, national legislative study completed in 2011—sought to tackle “inconsistent state laws on domestic minor sex trafficking and misidentification of victims by identifying distinct policy principles that need to be followed to ensure ‘a safer environment for children,’” this study mainly operated within a criminal law framework.⁴⁴ Scholars have expressed that policy principles should ensure that anti-trafficking laws could “work in tandem” with other laws and to scrutinize statutes to assess “the actual scope of coverage, potential gaps in coverage, and potential administrative and legal barriers to their enforcement, in a way that provides effective, comprehensive services for children.”⁴⁵ However, when the Initiative’s policy principles were expanded into six points of law, five of those had a criminal law focus, including: “1) criminalization of domestic minor sex trafficking; 2) criminal

http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf; Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 622–23, 629 (2013).

⁴⁰ Sara A. Lulo, *Child Exploitation and Trafficking*, 28 CRIM. JUST. 63 (2003) (book review).

⁴¹ Nicole Tutrani, *Open for the Wrong Kind of Business: An Analysis of Virginia’s Legislative Approach to Combating Commercial Sexual Exploitation*, 26 REGENT U. L. REV. 487, 511–18 (2014); see Lulo, *supra* note 40, at 64.

⁴² Lulo, *supra* note 40, at 64.

⁴³ George & Smith, *supra* note 16, at 86–94.

⁴⁴ Dysart, *supra* note 39, at 635; see SHARED HOPE INT’L, *supra* note 36, at 1–4.

⁴⁵ Kathleen A. McKee, “It’s 10:00 P.M. Do You Know Where Your Children Are?,” 23 REGENT U. L. REV. 311, 324 (2011); see Dysart, *supra* note 39, at 621.

provisions addressing demand; 3) criminal provisions for traffickers; 4) criminal provisions for facilitators; 5) protective provisions for minor victims; and 6) criminal justice tools for investigation and prosecution.”⁴⁶

A. Failed Offender Reform

While the mainstays of the criminal law response to CSEC—punishing exploiters and buyers—may temporarily keep these groups from offending, those efforts are usually reactionary, with attenuated results. Buyers typically face little more than probation and enrollment in a “John’s School,” a mandatory law enforcement-run course about the dangers of sex with underage children; however, penalties for buyers are beginning to increase with new legislation.⁴⁷ Some scholars hold out the Nordic model of increased criminalization of demand and decriminalization of all sex work as the key solution.⁴⁸ One regional study of johns has reported that johns stated they would be less likely to pay for sex if they faced incarceration or sex offender registration.⁴⁹ However, longstanding criminal justice research suggests that further enhancing criminal sanctions will provide relatively little additional deterrence.⁵⁰ On the contrary,

⁴⁶ SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE FACT SHEET (2012), <https://sharedhope.org/wp-content/uploads/2013/11/PIC-2013-Fact-Sheet.pdf>; SHARED HOPE INT’L, *supra* note 36, at 4; Dysart, *supra* note 39, at 639.

⁴⁷ VERY YOUNG GIRLS at 19:00–20:00 (Swinging T Prod. 2007) (starring Rachel Lloyd, founder of Girls Education and Mentoring Services (GEMS) program for commercially sexually exploited girls and young women in New York City); 18 U.S.C. § 2252 (2003); 42 U.S.C. § 16911(3)(A)(i) (2012); Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1340 (2015).

⁴⁸ Laura J. Lederer, *Addressing Demand: Why and How Policymakers Should Utilize Law and Law Enforcement to Target Customers of Commercial Sexual Exploitation*, 23 REGENT U. L. REV. 297, 299–300 (2011).

⁴⁹ MELISSA FARLEY ET AL., COMPARING SEX BUYERS WITH MEN WHO DON’T BUY SEX 36–37 (2011), <http://www.prostitutionresearch.com/pdfs/Farleyetal2011ComparingSexBuyers.pdf>.

⁵⁰ Jonathan Todres, *A Child Rights Framework for Addressing Trafficking of Children*, 22 MICH. ST. INT’L L. REV. 557, 566–69 (2014); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 977 (2003) (“[T]he ability of doctrinal manipulation to produce an alteration of deterrent effect is highly limited”); see also James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12

societal over-reliance on incarceration for both adults and youth from varied backgrounds largely fails to decrease crime, while draining human resources from communities, straining social support systems, draining government budgets, increasing unemployment, and causing broader social fragmentation.⁵¹

Criminal law approaches to CSEC also leave a majority of sexual violence unaddressed and overlook a crucial reality. Most sexual violence actually occurs among intimates or acquaintances in places like university campuses, military bases, religious and secular youth programs and schools, and homes.⁵² Research reveals that most new arrests for sex crimes do not involve persons on sex offender registries.⁵³ Although many commentators on CSEC tend to demonize and typecast offenders, a majority of the people who buy, exploit,

HEALTH AFFAIRS, no. 4, Nov. 1993, at 7, 11, <http://content.healthaffairs.org/content/12/4/7.full.pdf>.

⁵¹ See, e.g., Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1557–60, 1604 (2014) [hereinafter *Regulating Sexual Harm*]; Mathias H. Heck Jr., *Focus on Abolishing Slavery and Involuntary Servitude Here at Home*, 29 CRIM. JUST. 1, 46 (2014); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 188 (2010); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 396 (2008); PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 34 (2008) (problematizing mass incarceration); see also Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 133, 136 (2011); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1200–01 (2015) [hereinafter *Prison Abolition*]; ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 38 (2003); but see, Amanda Shapiro, *Buyer Beware: Why Johns Should Be Charged with Statutory Rape for Buying Sex from a Child*, 23 J.L. & POL'Y 449, 504 (2014).

⁵² *Regulating Sexual Harm*, supra note 51, at 1556.

⁵³ *Id.* at 1558 (citing Alissa R. Ackerman et al., *Who Are the People in Your Neighborhood? A Descriptive Analysis of Individuals on Public Sex Offender Registries*, 34 INT'L J. OF L. & PSYCHIATRY 149, 149 (2011) (examining the heterogeneity of the population of registered sex offenders); Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 414 (2010) (reporting that 96% of all new arrests for sexual crimes in New York occurred among those without previous sexual crime convictions).

and corrupt children are not classic sexual abusers or pedophiles. Most research to-date focuses on johns.⁵⁴ Surprisingly,

[t]he ‘Johns’ are average citizens from every walk of life. They are doctors, lawyers, judges, celebrities, chief executive officers, construction workers, and plumbers. ‘Rich and poor, young and old, the men who buy the women and girls in prostitution are from every race/ethnicity in the world.’ Many tend to think that these ‘Johns’ are sadistic, psychotic men, as society naturally tends to vilify and demonize them. However, these ‘Johns’ are our fathers, brothers, husbands, and sons. Until we realize that fact, we will not see where the demand side of this industry stems from and the problem will continue to run rampant.⁵⁵

These average men feel a sense of “sexual entitlement” and take advantage of children’s vulnerabilities and a range of perverse cultural norms, and they are not disconnected from the perpetration of sexual violence in intimate or more innocuous spaces.⁵⁶ Many of them do not request an underage sex worker or a victim of trafficking; yet, most do not ask a child this information or refuse sexual activity with the sex worker who comes their way.⁵⁷ While estimates of the numbers of men who have ever purchased females for prostitution range widely from 16%–80%, Melissa Farley argues that “a conservative guess at the percentage of US johns” could be as high

⁵⁴ See, e.g., Cheryl George, *Jailing the Johns: The Issue of Demand in Human Sex Trafficking*, 13 FLA. COASTAL L. REV. 293 (2012).

⁵⁵ *Id.* at 297 (citing Melissa Farley, “The Demand for Prostitution”, CAPTIVE DAUGHTERS, <https://web.archive.org/web/20120304084821/http://captive-daughters.org/2003conf.html> (last visited Sep. 10, 2016) (emerging evidence indicates that increasing numbers of female traffickers are involved in the trafficking of minors)); see also Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN’S L.J. 117, 121 (2002).

⁵⁶ George, *supra* note 54, at 298–300.

⁵⁷ See Shapiro, *supra* note 51, at 480–82.

as “around 50% of all men.”⁵⁸ Most are married and employed.⁵⁹ Some scholars have begun to emphasize the pressing need to combat the widespread socio-cultural influences that create demand for CSEC in the first place.⁶⁰ They suggest that pimps and exploiters would be driven out of business if the demand problem was thoroughly addressed.⁶¹ These voices blame lingering patriarchy, as evidenced in mainstream media and advertising that objectifies females and children, continued economic gender inequality, explicit sexualization in the fashion industry, and pornography.⁶² These critics assert that largely unreported sexual abuse in less suspect parts of society are significantly connected to CSEC.⁶³

Carceral solutions for CSEC offenders miss the essential point. If demand for CSEC stems from the tendencies of average men, opportunistic exploiters, at-risk youth, and complex socio-cultural factors, true progress means addressing the role of sexuality and oppression in all sectors. In actuality, incarcerating more people—whether they are large-scale pimps or many of our husbands, fathers, brothers, sons, and neighbors—prevents real change at its source.⁶⁴ Further, focusing resources on prosecution, incarceration, and sex offender monitoring ensures that child survivors will require some

⁵⁸ George, *supra* note 54, at 298; *see also* INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE OF DEPAUL UNIVERSITY COLLEGE OF LAW AND CAPTIVE DAUGHTERS, DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING 32, 55 (Morrison Torrey & Sara Dubin, eds. 2003), *available at* http://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/publications/Documents/demand_dynamics.pdf; MELISSA FARLEY, PROSTITUTION & TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 173–181 (2007); MICHAEL SHIVELY, KRISTINA KLIORYS, ET AL., NAT’L INST. OF JUSTICE, A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT (2012), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>.

⁵⁹ *Id.*; RACHEL LLOYD, GIRLS LIKE US 107 (2011); Shapiro, *supra* note 51, at 479–80.

⁶⁰ *See, e.g.*, George, *supra* note 54, at 316–324; Shapiro, *supra* note 51, at 504.

⁶¹ George, *supra* note 54, at 325.

⁶² *Id.* at 316–324.

⁶³ *See* Shapiro, *supra* note 51, at 462–65; *Regulating Sexual Harm*, *supra* note 51, at 1555–57.

⁶⁴ *See generally* *Regulating Sexual Harm*, *supra* note 51, at 1555–1559.

level of cooperation with law enforcement and will receive fewer resources for their own societal re-entry.⁶⁵

B. *Direct Harm to CSEC Survivors*

Criminal law harms CSEC survivors by directly traumatizing them with harsh law enforcement contact and abuse, insensitive criminal justice system processes, and the justice system's protectionist, non-governmental outgrowths.⁶⁶ Too many human trafficking laws still focus on the prosecution of minors for prostitution, despite federal and international guidance to the contrary.⁶⁷ For example, New York, like a growing number of states, has "safe harbor" laws for sexually exploited children under age 16 and has created a separate system of problem-solving, criminal courts to handle other prostitution and trafficking, with funding allotted for survivors.⁶⁸ Yet, those over age 15 who are sexually exploited must be arrested and processed as criminals in order to receive the array of services linked to the courts.⁶⁹ As 16- and 17-year-olds are tried automatically as adults in New York due to the state's juvenile court jurisdiction threshold, many youth under age 18 receive damaging criminal records despite receiving services and assistance.⁷⁰ Most safe harbor laws also require child survivors to aid state prosecution of their exploiters, even though the Trafficking Victims Protection Reauthorization Act (TVPRA) has relinquished this requirement.⁷¹ Currently, at least twenty-eight states have enacted some version of safe harbor laws.⁷² There is also extensive research on the trauma that law enforcement investigations and criminal trials cause to

⁶⁵ See George, *supra* note 54, at 332–33.

⁶⁶ See generally Birckhead, *supra* note 12.

⁶⁷ See Dempsey, *supra* note 6, at 211; CLAYTON, *supra* note 12, at 8; Birckhead, *supra* note 12, at 1061–62; FARRELL, *supra* note 12, at 190.

⁶⁸ William K. Rashbaum, *With Special Courts, State Aims to Steer Women Away From Sex Trade*, N.Y. TIMES (Sept. 26, 2013).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See e.g., Nicholas Confessore, *New Law Shields Children Prostitution Charges*, N.Y. TIMES (Sept. 26, 2008), http://www.nytimes.com/2008/09/27/nyregion/27harbor.html?_r=0; POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 35 (2013).

⁷² NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 10.

CSEC survivors, even when they result in the incarceration of traffickers. Such trials are unnecessarily lengthy, often unsuccessful, and force exploited children to repeat their harrowing experiences to countless personnel and to potentially testify against someone they are deeply attached to and often fearful of.⁷³ CSEC survivors face significant threats, both personally and to their loved ones, when they participate in the prosecution of their exploiters.⁷⁴

The juvenile and criminal justice system are also particularly ineffective in reforming youth behavior and are highly criminogenic.⁷⁵ A growing literature demonstrates that the most punitive approaches to youth crimes such as prostitution are developmentally inappropriate and cause youth to develop psychological damage, poor coping skills, negative peer associations, and a higher propensity to avoid seeking future intervention.⁷⁶ Additionally, there is an interplay between adolescent brain development and juvenile justice. Neuroscientific research cited in numerous recent U.S. Supreme Court cases, along with U.S. Dept. of Health data, reveal that adolescents as a group show particular traits of impulsivity, risk-taking,

⁷³ See ECPAT INTERNATIONAL, ACCESS TO JUSTICE FOR CHILD VICTIMS OF SEXUAL EXPLOITATION IN TRAVEL AND TOURISM 3–4, <http://globalstudysectt.org/wp-content/uploads/2016/04/Expert-Paper-ECPAT-Barriers-to-Access-to-Justice.pdf> (last visited Aug. 14, 2016).

⁷⁴ See Joan A Reid & Shayne Jones, *Exploited Vulnerability: Legal and Psychological Perspectives on Child Sex Trafficking Victims*, 6 VICTIMS & OFFENDERS 207, 211 (2011) (citing JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 32–34 (1992)); JUDITH LEWIS HERMAN, HIDDEN IN PLAIN SIGHT: CLINICAL OBSERVATIONS ON PROSTITUTION 5 (Melissa Farley ed., 2011) [hereinafter PLAIN SIGHT]; Birckhead, *supra* note 12, at 1084–85 (citing Christiana M. Lamb, *The Child Witness and the Law: The United States' Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT'L L. 63, 70–71 (2011); see also Sewell Chan, *A Look at the Harrowing Lives of Child Prostitutes*, N.Y. TIMES (Jul. 3, 2008), <http://cityroom.blogs.nytimes.com/2008/07/03/a-look-at-the-harrowing-lives-of-child-prostitutes> (stating that the emotional ties with their pimps are even stronger than the threats of violence for prostituted children).

⁷⁵ See, e.g., Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. OF APPLIED RES. ON CHILD (2013).

⁷⁶ See *id.* at 7; LLOYD, *supra* note 59, at 111; Godsoe, *supra* note 47, at 1313; Fernando Camacho, *Sexually Exploited Youth: A View from the Bench*, 31 TOURO L. REV. 377, 383 (2015).

thrill seeking, lack of future orientation, substance use, and susceptibility to peer pressure, regardless of their race or socio-economic status.⁷⁷ These qualities undergird adolescent decision-making and can provide mitigating factors for juvenile defense. Youthful indiscretions and even law-breaking are typical among adolescents, and punitive approaches overwhelmingly fail to re-direct or rehabilitate.⁷⁸ Instead, adolescents require a particular and often fluid balance of guidance, support, opportunity, and empowerment.⁷⁹ Parts II-E and IV *infra* will describe the complex reasons why CSEC survivors, in particular, resist rescue narratives and paternalistic interventions involving the courts and social services. The participation of youth in CSEC—both as exploited children and as young “pimps” and “johns”—cannot be adequately resolved through criminal law. Criminal law responses are actually the most likely to lead to recidivism.⁸⁰ Some longitudinal studies reveal recidivism rates as high as 85% for youth involved in the juvenile justice system.⁸¹

⁷⁷ See Part IV, *infra* regarding neuroscience research on juvenile behavior and development, as cited in U.S. Supreme Court jurisprudence since 2005; *Juvenile Justice & the Adolescent Brain: Brain Science is Reforming Juvenile Justice Policy and Practice*, MASS. GENERAL HOSPITAL CTR. FOR LAW, BRAIN, & BEHAVIOR, <http://clbb.mgh.harvard.edu/juvenilejustice/> (last visited Oct. 25, 2016); U.S. DEP’T OF HEALTH & HUM. SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 154 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>; *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST. 2 (2006), http://www.adjj.org/downloads/6093issue_brief_3.pdf; *What Are the Implications of Adolescent Brain Development for Juvenile Justice?*, COALITION FOR JUV. JUST. (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf; Charisa A. Smith, *Don’t Wait Up—Issues in Juvenile Justice*, 28 N.J. FAM. LAW. 144, 144 (2008); Rebecca A. Colman, et al., *Delinquent Girls Grown Up: Young Adult Offending Patterns and Their Relation to Early Legal, Individual, and Family Risk*, 38 J. YOUTH ADOLESCENCE 355, 357 (2009), <http://ocfs.ny.gov/main/reports/NIJ%20YADOL%20Paper%20Author%20Version.pdf>.

⁷⁸ See Smith, *supra* note 75, at 145.

⁷⁹ See *id.* at 147–48 (citing Interview by Charisa A. Smith with Mike Males, Senior Researcher, Ctr. on Juvenile and Criminal Justice (Oct. 10, 2007)).

⁸⁰ See generally Colman, et al., *supra* note 77.

⁸¹ Colman, et al., *supra* note 77, at 356; see Smith, *supra* note 75, at 147–48; see also MACARTHUR FOUND., *supra* note 77, at 1, 3–4; Rebecca Colman et al., *Long-Term Consequences of Delinquency: Child Maltreatment and Crime in Early Adulthood*, N.Y. ST. OFFICE OF CHILD. & FAM. SERVS. Executive Summary

Some scholars even argue that more recent efforts to combine law enforcement activities surrounding CSEC with collaboration from nonprofit, corporate, or faith-based social service agencies—in the name of protection—present a dangerous outgrowth of the carceral state, rather than a safe alternative. Citing sociologist Elizabeth Bernstein, Jennifer Musto asserts that the use of non-state agencies to identify and “manage” CSEC survivors, while aiding law enforcement investigations, presents a “social justice as criminal justice” model and congeals “a neoliberal carceral agenda reliant upon ‘punitive systems of control.’”⁸² Musto is wary about the use of arrest as a gateway to social services, as well as the more seemingly innocuous partnerships developing between the criminal justice system and NGOs.⁸³ As long as youth are being monitored in society and online, this type of “carceral protectionism” can be considered a form of social control, intruding upon youth’s psychological, physical, and legal autonomy.⁸⁴ Other scholars describe the move to involve CSEC survivors in the justice system for purposes of protection as “punitive paternalism,” which represents moralistic overreach by the state.⁸⁵ Further, the authors of a groundbreaking new study of New York City’s Human Trafficking Intervention Courts—courts that hinge social service provision for survivors as young as age 16 upon these youths’ criminal prosecution—conclude, “we urge circumspection and hope that those concerned with

7 (March 31, 2009), available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/226577.pdf>.

⁸² MUSTO, *supra* note 31, at 8, 15 (citing Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 58 (2010) [hereinafter *Carceral Feminism*] and Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism”*, 18 DIFFERENCES: A J. FEMINIST CULTURAL STUD. 128, 137 [hereinafter *Sexual Politics*]).

⁸³ See generally MUSTO, *supra* note 31, at 27–47.

⁸⁴ See generally *id.*; see also Godsoe, *supra* note 47, at 1355–1357.

⁸⁵ Godsoe, *supra* note 47, at 1353 (citing Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHIL. (Jun. 19, 2016), <http://plato.stanford.edu/entries/paternalism>).

the punitivity of U.S. society do not simply replace one form of penalty with another but engage the larger distributional consequences of criminal law reform from within.”⁸⁶

C. Indirect Harm to CSEC Survivors

The focus of anti-CSEC resources on criminal law also ultimately harms survivors by short-shifting their fiscal and social needs.⁸⁷ One Oregon child trafficking report explains that for every one survivor accepted for services, another one is denied services due to insufficient funding.⁸⁸ Some scholars have begun to challenge the criminal law response to CSEC for these very reasons. Both Jonathan Todres and Jennifer Chacon assert that anti-trafficking discourse and response efforts are mired in a cycle of reacting to existing harms and punishing “bad actors,” without reconsideration for the balancing of law enforcement resources with prevention and “victim protection.”⁸⁹ Additionally, now that law enforcement efforts have become a priority, simply articulating a goal of prevention and victim support without thoroughly revamping the conceptual framework and strategic plans will likely be insufficient to fully shift sources of data-collection, expertise, resources, and incentives.⁹⁰ Musto adds that mere articulation of a concern for survivor welfare or of a victim-centered approach in more recent law and policy is a far cry from actual re-orientation of the frame and decreased reliance on criminal law.⁹¹ Law enforcement and carceral personnel are still

⁸⁶ Aya Gruber, Amy J. Cohen, & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. (forthcoming 2016).

⁸⁷ See generally Cristina M. Becker, *Violating Due Process: The Case for Changing Texas State Trafficking Laws for Minors*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 85, 85, 105 (2013).

⁸⁸ *Child Trafficking Report*, OR. PUB. BROAD. (Aug. 6, 2013), <http://www.opb.org/thinkoutloud/shows/child-trafficking-report/>.

⁸⁹ See Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT’L L. 53, 65 (2011) [hereinafter *Widening Our Lens*]; accord Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1621, 1628 (2010).

⁹⁰ See *Widening Our Lens*, *supra* note 89, at 65; Todres, *supra* note 50, at 560–61; Chacón, *supra* note 89, at 1621, 1626–27.

⁹¹ MUSTO, *supra* note 31, at 5–8; see *Widening Our Lens*, *supra* note 89, at 55; Todres, *supra* note 50, at 561; see also Chacón, *supra* note 89, at 1626–27;

considered the primary protectors of CSEC survivors, have overwhelmingly punitive tools, can use criminal consequences as leverage, and are even underreported perpetrators of sexual violence among CSEC survivors.⁹²

D. Avoidance of the Root Causes of CSEC

The criminal law response to CSEC presents an ineffective, temporary and reactionary quick fix to a very complex and deep-seated problem. Theoretically and practically, retributive criminal justice is not designed to address the full scope of harm. Rather, the focus is on punishing “bad actors” and potentially deterring them from repeating unacceptable behavior.⁹³ However, both the supply and the demand side of CSEC have deep roots.⁹⁴ On the supply side, children’s disadvantages, cultural pressures, and exploiters’ shrewdness lead to a ready supply of children for commercial sexual exploitation.⁹⁵ At times, the children need little manipulation but are still legally unable to consent to sex. On the demand side, as previously discussed, potential buyers—primarily, but not always, men—feel entitled to purchase sex from an unknown person, both out of physical craving and out of general acceptance for the objectification of females and children, along with an immediate gratification consumer culture.⁹⁶ This section addresses the socio-cultural and socio-

Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1658–59 (2010); Dina Francesca Haynes, *Used, Abused, Arrested, and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 225 (2004); see generally Kristin Bumiller, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 2 (2008).

⁹² YOUNG WOMEN’S EMPOWERMENT PROJECT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL 30 (2009), <https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf>; GEMS lecture, *supra* note 47.

⁹³ See Jonathan Todres, *Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation*, 43 VAND. J. TRANSNAT’L. L. 1, 4–5 (2010) [hereinafter *Taking Prevention Seriously*].

⁹⁴ See, e.g., George, *supra* note 54, at 295–298; Hotaling & Levitas-Martin, *supra* note 55, at 118–20.

⁹⁵ See Hotaling & Levitas-Martin, *supra* note 55, at 119–20.

⁹⁶ See George, *supra* note 54, at 295–301.

economic roots of CSEC. Part III will provide a theoretical context in which to view the issue.

E. Socio-cultural and Socio-economic Roots of CSEC

Criminal law cannot adequately eradicate CSEC because the supply of children entering the sex industry is caused by far more than the wrongdoing of exploiters and buyers. Children come to their involvement in CSEC, exotic dancing, child pornography, pimping, and solicitation vis-à-vis several social and economic factors.⁹⁷ CSEC survivors are overwhelmingly survivors of intrafamilial violence and dysfunction, including incest, physical and sexual abuse, neglect, emotional maltreatment, and intimate partner violence.⁹⁸ Youth in CSEC tend to have significant health and mental health needs, including substance use issues.⁹⁹ At least a considerable portion of exploited children are also gender non-conforming or lesbian, gay, bisexual or transgender.¹⁰⁰ Exploiters and solicitors of children for sex target neighborhoods in turmoil that feature overt interpersonal violence and substance abuse.¹⁰¹ Additionally, exploiters and solicitors target locales where they can find vulnerable youth who have run away from home, have left unsafe or intolerant school environments, or are impoverished.¹⁰² In short, the cycles of disadvantage and abuse cannot be underestimated.

⁹⁷ See POLARIS, SEX TRAFFICKING IN THE U.S.: A CLOSER LOOK AT U.S. CITIZEN VICTIMS 7 (Fall 2015), <https://polarisproject.org/sites/default/files/us-citizen-sex-trafficking.pdf>; see, e.g., Sarah E. Twill et al., *A Descriptive Study on Sexually Exploited Children in Residential Treatment*, 39 CHILD YOUTH CARE F. 187, 188–89 (2010).

⁹⁸ See, e.g., Reid & Jones, *supra* note 74, at 215–16; Claire Chiamulera, *Learning from Homeless Youth: A Lawyer's Journey*, 32 CHILD L. PRAC. NEWSL. 154, 154 (2013).

⁹⁹ Twill et al., *supra* note 97, at 189 (2010).

¹⁰⁰ Bernadette Brown, *The Commercial Sexual Exploitation of LGBTQ Youth*, NCCD BLOG (Nov. 26, 2012), <http://www.nccdglobal.org/blog/the-commercial-sexual-exploitation-of-lgbtq-youth>.

¹⁰¹ See Reid & Jones, *supra* note 74, at 218–19 (citing extensive studies); POLARIS, *supra* note 97, at 7.

¹⁰² VERY YOUNG GIRLS, *supra* note 47, at 8:52–9:20; see also POLARIS, *supra* note 97, at 7.

In 2014, the National Center for Missing & Exploited Children (NCMEC) estimated that one in six endangered runaways reported to them were likely sex trafficking victims.¹⁰³ Sixty-seven percent of the children reported missing in 2012 to NCMEC, who are likely child sex trafficking victims, were in foster care at the time.¹⁰⁴ A random survey conducted by Covenant House of 200 homeless youth in New York City's largest shelter revealed that "23% had engaged in survival sex or experienced trafficking," often due to coercion by a lack of shelter.¹⁰⁵ Further, an estimated 1.6 million children between ages 12 and 17 experience homelessness without a parent or guardian each year in the U.S., and many of them are at risk for CSEC, as it remains a vastly underreported phenomenon.¹⁰⁶

CSEC survivors have often touched several public systems in the past and even during their sexual exploitation, including but not limited to child welfare, education, law enforcement, juvenile corrections, and the courts. The failure of multiple public systems to address children's original needs contributes significantly to children's propensity to enter the sex industry.¹⁰⁷ Many youth involved

¹⁰³ National Center for Missing & Exploited Children, *Child Sex Trafficking*, <http://www.missingkids.com/lin6> (last visited Sep. 14, 2016).

¹⁰⁴ *Protecting Vulnerable Children - Preventing and Addressing Sex Trafficking of Youth in Foster Care: Hearing Before the H. Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 113th Cong. 6 (2013) (statement of John D. Ryan, CEO of the National Center for Missing and Exploited Children).

¹⁰⁵ Chiamulera, *supra* note 98, at 155.

¹⁰⁶ NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *ALONE WITHOUT A HOME: A STATE-BY-STATE REVIEW OF LAWS AFFECTING UNACCOMPANIED YOUTH* 5 (2012), https://www.nlchp.org/Alone_Without_A_Home; HEATHER HAMMER, ET AL., U.S. DEP'T OF JUSTICE, *RUNAWAY/THROWNAWAY CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS* 2 (2002), <https://www.ncjrs.gov/pdffiles1/ojdp/196469.pdf> ("In 1999, an estimated 1,682,900 youth had a runaway/throwaway episode."); *see also* ELLEN L. BASSUK, ET AL., THE NAT'L CTR. ON FAMILY HOMELESSNESS, *STATE REPORT CARD ON CHILD HOMELESSNESS: AMERICA'S YOUNGEST OUTCASTS* 85 (2010), http://www.hartfordinfo.org/issues/wsd/Homelessness/NCFH_AmericaOutcast2010_web.pdf.

¹⁰⁷ *See e.g.*, KATE WALKER, CALIFORNIA CHILD WELFARE COUNCIL, *ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA* 18 (2013); MEREDITH DANK, ET AL., URBAN INST., *INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, AND YWSW WHO ENGAGE IN SURVIVAL SEX* 2-5 (2015), <http://www.urban.org/sites/default/files/alfresco/publication->

in survival sex mention negative interactions with, and rejection from, public system officials as key reasons why they refrain from seeking social service assistance, and aging out of foster care often causes youth homelessness and emotional instability.¹⁰⁸ Often, sexually exploited youth are loyal to their traffickers and pimps due to traumatic bonds resulting from their past trauma and hardships, and their current state of anguish and suffering.¹⁰⁹ Many consider themselves to be in a consensual, romantic relationship with their pimp or exploiter.¹¹⁰ For this reason, social service experts argue that “a multisystem coordinated approach” and “a child-centered approach” are needed to fight trafficking successfully.”¹¹¹

Several scholars, many notably with combined expertise in law, social science, public health, and mental health, are encouraging a shift in the criminal law response to CSEC. These scholars seek to prioritize survivor services, prevention, and restorative justice.¹¹² Some coin the phrase “a victim-centered approach” and others have improved that term by coining a “survivor-centered approach,” asserting that the tensions between criminal and civil approaches have plagued the child trafficking policy work, funding debates, and discourse for years.¹¹³ Jonathan Todres makes a particularly compelling argument that a public health perspective towards CSEC should

pdfs/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf; *Taking Prevention Seriously*, *supra* note 93, at 39; Godsoe, *supra* note 47, at 1330–32.

¹⁰⁸ DANK, ET AL., *supra* note 107, at 4.

¹⁰⁹ See, e.g., Reid & Jones, *supra* note 74, at 219; Godsoe, *supra* note 47, at 1332; see generally *Widening Our Lens*, *supra* note 89, at 57.

¹¹⁰ See Ella Cockbain & Helen Brayley, *Child Sexual Abuse is Never Consensual, Whatever the Victim's Behaviour*, THE GUARDIAN (Sep. 27, 2012 11:37 A.M.), <https://www.theguardian.com/commentisfree/2012/sep/27/child-sexual-abuse-consensual-victim-behaviour>.

¹¹¹ See WALKER, *supra* note 107, at 54; *Taking Prevention Seriously*, *supra* note 93, at 35–37.

¹¹² See e.g., Micah N. Bump, *Treat the Children Well: Shortcomings in the United States' Effort to Protect Child Trafficking Victims*, 23 Notre Dame J.L. Ethics & Pub. Pol'y 73, 79, 96 (2009); *Taking Prevention Seriously*, *supra* note 68, at 38.

¹¹³ See Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 Geo. Immigr. L.J. 337, 346 (2007); see also Micah N. Bump & Julianne Duncan, *Conference on Identifying and Serving Child*

be taken, with a focus on comprehensive, proactive prevention instead of on reactive punishment.¹¹⁴ Todres explains that public health success occurs “when a population has been fully immunized so that illness is prevented.”¹¹⁵ That approach is far preferable to “vaccinating a population,” waiting for a major disease outbreak, and then punishing the parties most responsible for the lives lost or harmed.¹¹⁶ Yet, criminal law interventions and limited survivor services remain primarily reactive.¹¹⁷ Further, Todres contends, public health has developed extensive expertise on “addressing harmful attitudes and behaviors . . . that exacerbate harm or increase the risk of adverse health outcomes,” at the individual, institutional, and community levels.¹¹⁸ Such successful public health campaigns include those regarding youth smoking, nutrition, seat belt use, and violence.¹¹⁹ Todres asserts that such an approach could help confront “underlying supply-related issues, including by improving identification of risk factors associated with vulnerability to trafficking and related forms of exploitation.”¹²⁰

Despite the progress some scholars have made in discussing the root causes of CSEC, the discourse and the socio-legal response remain flawed. Drawbacks of a public health approach to CSEC include extremely long-term impact, the danger of reaching too few youth by reliance on voluntary assistance-seeking, and lack of a link to current funding realities which rely more on a young person’s “status” as a victim or offender involved with law enforcement.¹²¹ Yet, branding CSEC survivors as status offenders who receive both protective services and potential punishment keeps skeptical youth

Victims of Trafficking, 41 Int’l. Migration 201, 208 (2003); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 Stan. J. C.R. & C.L. 317, 318, 331–33 (2007); Jonathan Todres, *Addressing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & Pol’y 93, 96–102, 104 (2013) [hereinafter *Addressing Public Health*].

¹¹⁴ *Addressing Public Health*, *supra* note 113, at 101–10.

¹¹⁵ *Id.* at 103.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 104.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 105.

¹²¹ See Godsoe, *supra* note 47, at 1382–83.

dependent on paternalistic court involvement and surveillance; while pure child protective approaches relegate these youth to an ill-equipped child welfare system that has historically rejected them, failed them, and ignored their independent streak.¹²² None of these approaches thoroughly account for CSEC survivors' primary need for housing, skills training, employment, medical, mental health, and legal services, and a non-judgmental support system.¹²³ Commentators and system actors fail to find solutions that account for both exploited youth's need for adult guidance and financial support, and also their unique autonomy, agency, independence, and stigmatization by families and child welfare interventions.

However, acknowledging the role of youth agency in CSEC, its prevention, and its solution is essential. In actuality, exploited children's circumstances may make them resistant to rescue or exit, even when faced with prosecutorial immunity and social services. Children being exploited and exploiting their peers have myriad reasons leading them towards "The Life" and may be hesitant to leave.¹²⁴ Mistrust of law enforcement, the criminal justice system, social services agencies, and people in general, is common among sexually exploited youth.¹²⁵ New empirical research has criticized previous studies on CSEC for being inherently biased, by deriving access to youth from law enforcement contact or social services contact, with relatively small samples.¹²⁶ Contrastingly, a study by Marcus, et al., claims to be "the largest dataset ever collected in situ in

¹²² *Id.* at 1379–81.

¹²³ See, e.g., Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. Rev. 1586, 1595 (2015); WALKER, *supra* note 107, at 39; Godsoe, *supra* note 47, at 1332.

¹²⁴ See, e.g., DANK, ET AL., *supra* note 107, at 1–5; Camacho, *supra* note 76, at 378–79.

¹²⁵ THE NAT'L CHILD TRAUMATIC STRESS NETWORK, U.S. DEP'T OF HEALTH AND HUMAN SERVS., FACTS FOR POLICYMAKERS: COMMERCIAL SEXUAL EXPLOITATION OF YOUTH 2 (2015), http://www.nctsn.org/sites/default/files/assets/pdfs/csec_policy_brief_final.pdf; Lloyd, *supra* note 59, at 106–07; DANK, ET AL., *supra* note 107, at 2; Godsoe, *supra* note 47, at 1329; Camacho, *supra* note 76, at 378–79.

¹²⁶ See Jennifer Musto, *Domestic Minor Sex Trafficking and the Detention-To-Protection Pipeline*, 37 DIALECT ANTHROPOLOGY 257, 257–260 (2013); see also Jordan Greenbaum et al., *Child Sex Trafficking and Commercial Sexual Exploitation: Health Care Needs of Victims*, 135 PEDIATRICS 566 (2015).

the United States on minors working in the sex trade,” and claims that other researchers are too quick to cast “captivity narratives.”¹²⁷ The Marcus et al., study was conducted in 2008 in New York and Atlantic City, and suggests that far fewer children in the sex trade feel continually coerced or controlled by a pimp than was previously thought.¹²⁸ Further, the glorification of “pimping,” hyper-masculinity, violence, and the objectification of children and females in popular culture continues to be normalized and absorbed by both youth and adults throughout the U.S., blurring the lines between coercion, choice, and agency.¹²⁹ This socio-cultural and socio-economic analysis adds a crucial dimension to the discourse, and further clarifies

¹²⁷ Anthony Marcus et al., *Conflict and Agency Among Sex Workers and Pimps: A Closer Look at Domestic Minor Sex Trafficking*, 653 ANNALS AM. ACAD. POL. & SOC. SCI. 225, 227 (2014).

¹²⁸ *Id.* at 241

¹²⁹ See Kimberly Kotrla, *Domestic Minor Sex Trafficking in the United States*, 55 SOC. WORK 181, 183 (2010) (“This culture of tolerance, fueled by the glamorization of pimping, is embodied in multiple venues of daily life, including clothing, songs, television, video games, and other forms of entertainment. Through a quick online search, one can locate information for throwing a successful ‘pimp and ho’ party or download one of many free ringtones, including ‘Pimpin All Over the World’ and ‘P.I.M.P.’ MTV, a popular television channel among youths and young adults, produces a show titled *Pimp My Ride*, about designing automobiles with cool, new features; a Wii game of the same name is now available for purchase. In *Keep Pimpin’* a free online game (<http://www.keeppimpin.com/index.php>), as a player you are a pimp and get to ‘slap your hoes, pimp the streets, kill the competition, and ally with your friends to take the pimp world by storm.’ The song ‘It’s Hard Out Here for a Pimp’ took top honors for Best Original Song at the 78th Academy Awards. In each of these examples, which only scratch the surface of those that exist, being a ‘pimp’ is equated with being ‘cool’ or ‘winning’” reflecting how pimps are “treated in popular culture as admirable rebels, as hip and stylish.”) (internal citations omitted); see Mary Schwab-Stone et al., *No Safe Haven II: The Effects of Violence Exposure on Urban Youth*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 359, 365–66 (1999); see generally U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD HEALTH USA 14 (2010), <https://web.archive.org/web/20110131183258/http://www.mchb.hrsa.gov/chusa10/pdfs/c10.pdf> (reporting that in 2007, more than 81% of U.S. children lived in urban areas); Renée Boynton-Jarrett, et al., *Cumulative Violence Exposure and Self-Rated Health: Longitudinal Study of Adolescents in the United States*, 122 PEDIATRICS 961, 967 (2008). (“[W]itnessing gun violence, threat of violence, feeling unsafe, repeated bullying, and criminal victimization each independently and significantly increased risk for poor [health].”).

that a criminal law response focused on demonizing exploiters, buyers, and sometimes even exploited children, will likely alienate and harm the very children it seeks to protect.

In sum, criminal law cannot effectively diminish or end CSEC due to its own ineffectiveness, its harmfulness, and the complex, deep roots of CSEC and other sexual violence throughout U.S. society.¹³⁰ Regardless of adults' perspective, an understanding of survivors' perspectives and wishes is key to helping them find reasonable alternatives. Sexually exploited youth can grasp the complexity of their situation better than many well-meaning outsiders who seek to use criminal law or its protectionist outgrowths paternalistically on these children's behalf. Further, strong parallels exist between the CSEC debate and the debate over the best remedies for female survivors of intimate partner (domestic) violence.¹³¹ Although criminal law as a response to CSEC may not be entirely inappropriate at all times, the overuse of criminal law without regard to the agency, perspective, circumstances, and leadership of the population at issue can exacerbate the situation.¹³²

III. THEORETICAL DIMENSIONS OF DOMESTIC CHILD SEX TRAFFICKING

A. *A Gap in the Theoretical Discourse*

Legal scholarship evinces a robust but lacking theoretical discourse on CSEC. Most theoretical scholarship on CSEC identifies the role of complex power imbalances in shaping children's involvement in CSEC, yet normatively recommends solutions that inadequately empower youth.¹³³

By considering feminist theory, critical race feminism, and Vulnerability Theory in conjunction with one another, this paper bridges a theoretical gap in the CSEC discourse. There is a crucial need for

¹³⁰ See e.g., *Addressing Public Health*, *supra* note 113, at 96–102.

¹³¹ See Chuang, *supra* note 91, at 1704–05.

¹³² See *id.* at 1704–06; *Addressing Public Health*, *supra* note 113, at 98–100.

¹³³ See, e.g., David Finkelhor et al., *Trends in childhood Violence and Abuse Exposure: Evidence from 2 National Surveys*, 164 ARCHIVES PEDIATRICS & ADOLESCENT MEDIC. 238, 238–39 (2010); Melissa Hamilton, *The Child Pornography Crusade and its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1716–17 (2012).

this bridge—particularly because the scholar, activist, and policy-making communities have reached an impasse of sorts on the matter of sex work and trafficking in general. The issue is highly charged. Although sex trafficking is colloquially referred to as “modern day slavery,”¹³⁴ there is a significant dissonance regarding the implications of this analogy. While some assert that there are more human slaves today than ever before in history due to the nature of sex work as coercive trafficking and slavery,¹³⁵ others support the decriminalization of sex work and elevate the role of choice in the matter, stating that “sex workers’ rights are human rights.”¹³⁶ Enthusiasm for legalization of adult sex work has implications for youth. Civically and legally decriminalizing adult sex work may cause children to find it a more viable career choice, deepen gender inequities, and perpetuate socio-economic fragmentation; yet, ignoring children’s own agency and choice in the sex trade also risks denying their resistance to rescue, as well as their individuality, agency, and common humanity.

This paper resists the over-simplification of children’s role in the response to CSEC, and comprehends that analyzing and addressing youth resistance to current forms of rescue and exit from CSEC can be crucial to the solution. The degree to which the most marginalized persons in society become sex workers, and the fact that many alleged adult sex workers “by choice” were coerced into such work while they were underage, make the move to legalize adult sex work questionable, though not wholly without merit. Although there is no quick fix, and there are no easy answers, scholars cannot afford to omit evidence that points to a need for youth agency and empowerment.

¹³⁴ BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 106–107 (2008).

¹³⁵ Terrence McNally, *There Are More Slaves Today Than at Any Time in Human History*, ALTERNET CIV. LIBERTIES (Jan. 12, 2015) <http://www.alternet.org/civil-liberties/there-are-more-slaves-today-any-time-human-history>.

¹³⁶ Catherine Murphy, *Sex Worker’s Rights are Human Rights*, AMNESTY INT’L (Aug. 14, 2015), <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>; URBAN JUSTICE CTR., *Working Group on Sex Work and Human Rights*, SEX WORKERS PROJECT 1 (last visited Aug. 1, 2016), <http://sexworkersproject.org/media-toolkit/downloads/04-SexWorkersAndHumanRights.pdf>.

The combined lenses of feminist theory, critical race feminism, and Vulnerability Theory create a crucial theoretical context in which to analyze CSEC. While scholars continue to apply these theoretical frames to CSEC in piecemeal fashion, none have thoroughly linked them to address continued critiques of normative and analytical responses to CSEC. This Article does not purport to thoroughly describe or engage the rich, nuanced debates among theorists. Instead, it briefly summarizes key elements of the theoretical discourse in order to address the pitfalls of most existing approaches to CSEC.

B. Feminist Theory

As previously mentioned, feminist discussion of the role of agency and legitimacy in sex work has important implications for CSEC. A missing part of the discourse involves the possibility that some level of agency and empowerment exists on the part of children in the sex trade, despite the dangers and inequalities at hand. “Radical,” “dominance,” or “structuralist” feminist theory does not distinguish prostitution from sex trafficking, arguing that all prostitution is gender violence, and that women are universally incapable of consenting to prostitution.¹³⁷ Catherine MacKinnon, Andrea

¹³⁷ See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 22, 25–26 (1993) (“the Thirteenth Amendment to prostitution claims enslavement as a term and reality of wider application, which historically it has been”) [hereinafter *Prostitution and Civil Rights*]; see also Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1994) (“Like slaves, prostitutes are raped, beaten, and tortured at the whim of the men who control them.”); Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 (1983) (“Male and female are created through the erotization of dominance and submission.”); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 186 (Penguin Books 1989); ANDREA DWORKIN, *INTERCOURSE* 79 (Basic Books 20th ed. 1987) [hereinafter *Intercourse*]; Janie Chuang, *Democracy, Gender, and Governance: Remarks by Janie Chuang*, 101 AM. SOC’Y INT’L L. PROC. 379, 381 (2007); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: For Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 409 (2006); Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, 34 HARV. J.L. & GENDER 225, 229 (2011); Janet Halley, *After Gender: Tools for Progressives in a Shift From Sexual Domination to the Economic Family*, 31

Dworkin, and other radical or dominance feminists defend “abolition” of prostitution by pointing out that adult sex workers have usually entered the trade as minors, have histories of sexual trauma or abuse, are overwhelmingly people of color or from socially marginalized groups, and have been historically impoverished.¹³⁸ They assert that any choice of sex work is inherently one compromised—“a desperate grab toward lost dignity”¹³⁹ that “harms women, both individually and by virtue of its tendency to sustain and perpetuate patriarchal structural inequality.”¹⁴⁰

Contrastingly, “individualist” feminists call for recognition of human rights and individual choice in sex work, arguing that failure to do so obscures “the primacy of the individual behind larger, structural concerns—an untenable position from the human rights perspective.”¹⁴¹ According to individualists, women can freely choose prostitution and other sex work, even when they are commercially managed by pimps or other third parties.¹⁴² These individualist feminists distinguish between consensual sex work and non-consensual, coerced sex trafficking, refusing to conflate “trafficking” with “prostitution.”¹⁴³ While individualists do not monolithically agree

PACE L. REV. 887, 887–88 (2011) [hereinafter *After Gender*]; Butler, *supra* note 13, at 849.

¹³⁸ See, e.g., *Prostitution and Civil Rights*, *supra* note 137, at 25–26; Katyal, *supra* note 137, at 793–96; DWORKIN, *supra* note 137, at 79.

¹³⁹ Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R. & C.L. L. REV. 271, 307 (2011).

¹⁴⁰ Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1745 (2010); see *Prostitution and Civil Rights*, *supra* note 137, at 22 (“[T]he Thirteenth Amendment to prostitution claims enslavement as a term and reality of wider application, which historically it has been.”); see also Katyal, *supra* note 137, at 791 (“Like slaves, prostitutes are raped, beaten, and tortured at the whim of the men who control them.”); MacKinnon, *supra* note 137, at 635 (“Male and female are created through the erotization of dominance and submission.”); DWORKIN, *supra* note 137, at 186; *Intercourse*, *supra* note 137, at 79; Chuang, *supra* note 137, at 381; Halley et al., *supra* note 137, at 409; Ahmed, *supra* note 137, at 229; Butler, *supra* note 13, at 849.

¹⁴¹ Halley et al., *supra* note 137, at 350.

¹⁴² See generally *id.*

¹⁴³ See generally Ahmed, *supra* note 137, at 230; Chuang, *supra* note 137, at 381; Halley et al., *supra* note 137, at 347.

on normative recommendations, individualist proposals often suggest partial decriminalization or legalization of sex work.¹⁴⁴ Additionally, a “pro-work” position in the trafficking discourse acknowledges that sex work is merely a form of wage labor without a specific link to gendered stigma.¹⁴⁵

C. Critical Race Feminism

A critical race feminist perspective on sex trafficking “explores the nexus between race and structural oppression . . . to diversify the discourse on how people of color experience prostitution.”¹⁴⁶ Karen Bravo asserts that successful eradication efforts regarding global trafficking must target “structural” sources of oppression.¹⁴⁷ When considering historical uses of white racial dominance and violence to colonize and oppress non-white populations around the globe, along with myriad uses of male dominance over women and children to retain patriarchy, Bravo finds the sources of trafficking to be extremely entrenched in international economic, socio-political and cultural structures.¹⁴⁸ Bravo critiques the criminal law response, contending that the complex economic, social, cultural, and political issue of human trafficking will not be eradicated or controlled through legal mechanisms that focus almost exclusively on prohibition and punishment of the trafficker and rehabilitation of victims.¹⁴⁹ Instead, Bravo finds a multi-faceted, structural response to sources of vulnerability and the economic roles of human trafficking to be necessary.¹⁵⁰

Other critical race feminists express skepticism about oversimplifying sex trafficking discourse and entrusting state instrumentalities with elimination of racial and sexual violence. Kimberle’ Crenshaw and Dorothy Roberts emphasize the need for intersectionality

¹⁴⁴ See e.g., Ahmed, *supra* note 137, at 232–33.

¹⁴⁵ See Halley et al., *supra* note 137, at 351; see also Chuang, *supra* note 137, at 381.

¹⁴⁶ Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 120 (2015).

¹⁴⁷ Karen E. Bravo, *The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse*, 9 SEATTLE J. SOC. JUST. 555, 582–83 (2011).

¹⁴⁸ *Id.* at 568.

¹⁴⁹ *Id.* at 583.

¹⁵⁰ *Id.*

when considering a wide range of socio-political issues, including gender violence, family law interventions, criminality and criminal law, and economic reforms.¹⁵¹ Both trace the historical and current use of state surveillance and control, suggesting that continued criminalization of people of color and monitoring of women's bodies and relationships can be a form of state oppression.¹⁵² Priscilla Ocen and Cheryl Butler describe how racism and xenophobia have stereotyped and stigmatized black female, and male, sexuality in colonial societies.¹⁵³ Ocen and Butler link this racial history to the persistent criminalization of sexually exploited children in the U.S. Ocen cites Department of Justice data that shows African-American girls are overrepresented among arrests for prostitution, in addition to being generally perceived as "more mature," less innocent, and more culpable in school discipline and juvenile justice matters.¹⁵⁴ Butler points out that 85% of sexually exploited minors are female, 67% are Black, and that sex trafficking of Native American women and girls is increasing at shocking and disproportionate rates.¹⁵⁵ Both Ocen and Butler importantly consider the impact of mass incarceration on communities of color and express the need to keep exploring its link with CSEC.¹⁵⁶ Both likewise assert that a states' failure to consider all paid sex by children to be inherently coercive denies the

¹⁵¹ See Kimberle' W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1441–50 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004).

¹⁵² Crenshaw, *supra* note 151, at 1446–47 (citing to Dorothy E. Roberts, *Punishment and Its Purposes: The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004).

¹⁵³ See Butler, *supra* note 145, at 101–03; Ocen, *supra* note 123, 1588–95.

¹⁵⁴ Ocen, *supra* note 123, at 1592, 1597 (citing DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 6 (2011), <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>. ("Studies, however, are unclear whether the disproportionate arrests and prosecution of Black girls for prostitution is as a result of increased exploitation or as a result of increased attention directed toward Black girls by law enforcement.")).

¹⁵⁵ Butler, *supra* note 146, at 133–34 (citing Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 672 (2012).

¹⁵⁶ See Ocen, *supra* note 123, at 1637; Butler, *supra* note 146, at 105–06.

fact that adult exploitation of childhood vulnerability always underpins CSEC.¹⁵⁷

Increasingly, a variety of feminist scholars are critiquing feminism's own obsession with a criminal law response to sex trafficking. Both critical race feminists and others, such as sociologist Elizabeth Bernstein, have begun to use the term "carceral feminism" to describe a misguided "crime-control agenda" that frames trafficking as a humanitarian issue that the privileged can combat by rescuing and restoring victims and punishing allegedly depraved perpetrators.¹⁵⁸ Critiques of carceral feminism accuse the anti-trafficking movement, the domestic violence movement, and other feminist and progressive efforts to oppose sexual violence, of forging unlikely alliances with groups such as religious conservatives and law enforcement, to endorse oppressive "state intervention in the form of increased policing, prosecution, and incarceration"¹⁵⁹ Further, Janet Halley, Aziza Ahmed, and others utilize the frame of "governance feminism" to assess feminist achievements "through an examination of the institutionalization of feminist projects in national and international governance structures."¹⁶⁰ Noting that feminist professionals and concepts have gained gradual prominence in both the legal domains of litigation, legislation, and policymaking, and also in non-state organizations, personal pressure campaigns, consciousness raising, and "discretionary legal moments," critics of governance feminism likewise reject feminist emphasis on criminal enforcement, including both the abolition and the legalization of sex work.¹⁶¹ A governance feminist analysis detects possible "unintended consequences" of feminist achievements, including low accountability of non-state actors, inadvertent support of border control agendas, legitimization of nonsexual types of exploitation, and the

¹⁵⁷ Ocen, *supra* note 123, at 1637; Butler, *supra* note 146, at 132.

¹⁵⁸ Chuang, *supra* note 91, at 1703; Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 143 (2007); see Roberts, *supra* note 151, at 1298.

¹⁵⁹ Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3217 (2015); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 758 (2007) [hereinafter *The Feminist War*].

¹⁶⁰ Ahmed, *supra* note 137, at 231.

¹⁶¹ Halley et al., *supra* note 137, at 341; see Chuang, *supra* note 137, at 382.

creation of underground markets for sexual exploitation that may be even more harmful to marginalized persons.¹⁶²

D. Vulnerability Theory

While feminist theory and critical race feminism do acknowledge the complexity of sex trafficking and its legal responses, neither approach goes far enough in addressing children's unique position in CSEC. Most such theorists mention children's inherent lack of agency within sex work while recommending insufficient child welfare responses, or otherwise refer to public health responses without a complete analysis of their potential shortcomings.¹⁶³ However, Vulnerability Theory provides an additional lens with which to view CSEC, revealing the need for an accounting of youth agency in any successful normative solution. Concepts of personal vulnerabilities in trafficking and gender violence enter into the analyses of Ahmed,¹⁶⁴ Gruber,¹⁶⁵ Bravo,¹⁶⁶ Crenshaw,¹⁶⁷ Roberts,¹⁶⁸ and many other theorists. Yet, viewing CSEC in particular through Vulnerability Theory illuminates a glaring omission in the discourse and legal response. Martha Fineman plays a leading role in describing universal vulnerability as a "new ethical foundation for law and

¹⁶² Halley et al., *supra* note 137, at 421 ("Our sense at the moment is that a preoccupation with normative achievements (message sending, making rape/sexual violence visible, changing hearts and minds among elites and across populations) and a legal imaginaire in which prohibition would 'stop' or 'end' conduct harmful to women—or decriminalize it in order to liberate them and give scope to their agency—animates the GF projects we are studying and detaches them from a certain pragmatic attitude and interest in complex distributional consequences that we seek to bring to the domain. We are all agreed that we're working, methodologically, for a new legal realism that would anticipate the complex ways in which legal entities meet complex societies.").

¹⁶³ See generally Chuang, *supra* note 137, at 386–87; Halley et al., *supra* note 137, at 372.

¹⁶⁴ Aziza Ahmed, "Rugged Vaginas" and "Vulnerable Rectums": *The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26.1 COLUM. J. GENDER & L. 1, 31 (2013) (criticizing attorney and activist over-reliance on identity politics in response to the HIV epidemic, including in discourse and approaches to sex work and sex trafficking; Ahmed, *supra* note 137, at 252).

¹⁶⁵ Gruber, *supra* note 159, at 3217–18.

¹⁶⁶ Bravo, *supra* note 147, at 571, 578.

¹⁶⁷ Crenshaw, *supra* note 151, at 1420–28.

¹⁶⁸ Roberts, *supra* note 151, at 1291–1300.

politics.”¹⁶⁹ She asserts that viewing the vulnerable subject as a heuristic device forces examination of hidden assumptions and biases folded into legal, social, and cultural practices.¹⁷⁰ Fineman rejects the Western, liberal notion that the fundamental legal and political subject is an autonomous, competent, independent individual with liberty to act in the market and in society.¹⁷¹ Instead, Fineman locates the vulnerable subject as the fundamental actor, asserting that a web of institutions and systems in society and the market distributes privileges, enabling us to build resilience to weather our universal human vulnerability.¹⁷² Along these lines, dependency is fundamental to our existence.

Rather than accepting the notion that various “vulnerable populations” in society face historical and systemic discrimination, Fineman suggests that the notion of “vulnerable populations” is both over-inclusive and under-inclusive.¹⁷³ She finds all persons to be inherently vulnerable—with the possibility of tragedy, illness, missteps, or disaster arising at any moment—and asserts that social institutions, systems, and the state tend to provide certain groups and individuals with more resources and privileges for becoming more resilient than others.¹⁷⁴ Likewise, certain harms may statistically cluster among certain groups.¹⁷⁵ Finding that interdependence un-

¹⁶⁹ See generally Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in GENDER IN LAW, CULTURE, AND SOCIETY: VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 1–27 (Ashgate 2013).

¹⁷⁰ *Id.* at 13; see also Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266 (2010) [hereinafter *The Vulnerable Subject*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008) [hereinafter *Anchoring Equality*]; Jennifer S. Hendricks, *Renegotiating the Social Contract*, 110 MICH. L. REV. 1083, 1083–84 (2012) (reviewing MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 3 (Oxford U. Press, Inc. 2010)).

¹⁷¹ *The Vulnerable Subject*, *supra* note 170, at 262–63.

¹⁷² *Id.* at 268–69.

¹⁷³ *Anchoring Equality*, *supra* note 170, at 4.

¹⁷⁴ *The Vulnerable Subject*, *supra* note 170, at 272–74.

¹⁷⁵ *Id.* at 268.

dergirds all social and political activity, Fineman reasons that a “responsive state” must address universal vulnerabilities in its subjects.¹⁷⁶

Fineman’s Vulnerability Theory at once identifies the limits of individualistic, rights-based concepts of the human condition yet also accounts for historical and cultural failures to address complex, pervasive structural inequality.¹⁷⁷ Broaching key questions raised by feminist and critical race feminist analyses of CSEC, Vulnerability Theory explains how sexually exploited children can simultaneously be products of socio-economic, racial, and sexual disadvantage, yet can also be resilient social actors capable of exercising agency and resistance to paternalistic overreach.¹⁷⁸ In fact, Fineman’s Vulnerability and the Human Condition Initiative at Emory Law School continues to explore the ways that childhood

should be treated as a first stage in the continuum of the human legal persona, which covers the full life-course of the individual from birth through to old age. Children, like persons in all other stages of life depend upon family, community, civic institutions, and government to flourish. Childhood illuminates but does not exhaust the interdependence that characterizes the human condition.¹⁷⁹

The question then becomes, “[w]hat is the state’s responsibility during this critical stage for the development of resilience?”¹⁸⁰

¹⁷⁶ *Id.* at 260, 266–67; *see also* Fineman, *supra* note 117, at 22; Hendricks, *supra* note 118, at 1085 (reviewing MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 3 (Oxford U. Press, Inc. 2010) (applauding Eichner’s efforts for arguing that “errors flow in part from liberalism’s moral ideal of free and independent citizens, which neglects the reality of human vulnerability and dependence.”).

¹⁷⁷ *The Vulnerable Subject*, *supra* note 170, at 252–55.

¹⁷⁸ *Id.* at 269–73.

¹⁷⁹ Martha Albertson Fineman, Robert W. Woodruff Professor, Dir. of the Feminism and Legal Theory Project and the Vulnerability and the Human Condition Initiative, Emory Univ. – Sch. of Law, Vulnerability and the Human Condition Initiative Workshop at Emory University School of Law, Call for Papers: A Workshop on Children, Vulnerability, and Resilience (Dec. 11–12, 2015).

¹⁸⁰ *Id.* at 1.

Wholly considered, theoretical analysis incorporating feminist theory, critical race feminism, and Vulnerability Theory begins to illuminate CSEC survivors' unique circumstances, their resistance to criminal law solutions, and the flaws within child protective and public health approaches to CSEC. Many questions remain. Until scholars wrestle more fully with the paradox—that sexually exploited youth can be both non-criminal victims and resilient agents, in need of both adult support and personal empowerment and resources—we will fail to find effective responses to CSEC. Part IV below, therefore addresses the historical, cultural, and biological paradox of coexistent childhood vulnerability and agency, along with the need to acknowledge of the missing youth voice in CSEC responses. Part V presents civil law solutions as a promising alternative to the “quick fix” of criminal law, which can better enable exploited youth to exercise agency in exiting “The Life,” yet provide support from Fineman’s “responsive state” through adult guidance and material resources to most improve their chances of success.

IV. WRESTLING WITH A CRUCIAL QUESTION: WHO IS THE “CHILD” IN CSEC?

The above legal, sociological, and theoretical perspectives on CSEC raise several pertinent questions regarding possible improved solutions: Are minors under age 18 ever able to consent to paid sex, or to any sex with adults? Should all children’s participation in CSEC be decriminalized? Why should minors under age 18 require any level of agency in judicial, statutory, social service, or advocacy responses to CSEC? How can legal actors empower children involved in CSEC while still acknowledging children’s vulnerabilities and the inherent power imbalance involved in CSEC?

U.S. society has never set unified guidelines about a child’s ability to consent to sex with adults.¹⁸¹ Our legal response to children’s unique status and needs originates in English common law and still retains many elements of that influence.¹⁸² In general, in both sexual and nonsexual contexts, our legal system allows for a continuum of

¹⁸¹ See generally Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 1–11 (2006).

¹⁸² See generally Stephen Robertson, *Age of Consent Laws*, CHILD. & YOUTH IN HIST., <https://chnm.gmu.edu/cyh/case-studies/230> (last visited Sep. 17, 2016).

maturity. It is also important to note that there are complex cultural and historical differences in concepts of childhood and sexuality, both in the past and present.¹⁸³ While a modern day pre-teen girl who becomes pregnant has the right in many states to obtain an abortion without parental consent, that same girl will remain legally prohibited from smoking cigarettes, signing economic contracts, marrying, and voting, until she reaches various other ages of state-sanctioned maturity.¹⁸⁴ That same pre-teen girl's sexual activity with an adult is seen as inherently nonconsensual due to the concept of diminished capacity among minors.¹⁸⁵ All states maintain ages of minor consent in their statutory rape laws; although the ages vary between states.¹⁸⁶ Yet, as previously discussed, many states contrastingly continue to prosecute children as prostitutes for sex acts with adults, even when the child falls under the state's statutory age of consent to sex.¹⁸⁷ The following sections will explore the matter of minors' consent to sex and the need for youth agency in approaches to CSEC.

To be clear, this Article contends that all participation in CSEC by youth under age 18 should be decriminalized—as the TVPRA asserts.¹⁸⁸ Variant state laws that still prosecute children for CSEC should be repealed, whether the child is the object of exploitation, the exploiter, or the buyer. In the U.S., there is a broad consensus surrounding minors' diminished capacity to consent to sex, both at commonly accepted cultural levels and under law.¹⁸⁹ There are also strong policy reasons to take their diminished capacity into account.¹⁹⁰ Yet, capacity to make mature decisions typically increases

¹⁸³ See generally, Jean Scandlyn, *Learning from Practice: Reframing the Scholarly Dialogue on Children's Rights and Sexuality*, 6 HUM. RTS. & HUM. WELFARE 75, 76 (2006) (reviewing OF INNOCENCE AND AUTONOMY: CHILDREN, SEX AND HUMAN RIGHTS 3 (Eric Heinze ed., Aldershot: Ashgate 2000)).

¹⁸⁴ See, e.g., RESEARCH DEP'T OF THE MINN. HOUSE OF REPRESENTATIVES, YOUTH AND THE LAW: A GUIDE FOR LEGISLATORS 55, 66, 82, 97, 100 (2014), <http://www.house.leg.state.mn.us/hrd/pubs/youthlaw.pdf>.

¹⁸⁵ See Drobac, *supra* note 181, at 1–11, 19–21.

¹⁸⁶ See *id.* at 1–3.

¹⁸⁷ See Butler, *supra* note 13, at 839.

¹⁸⁸ *Id.* at 838–39.

¹⁸⁹ See Drobac, *supra* note 181, at 1–11, 19–21.

¹⁹⁰ See generally Dysart, *supra* note 9, at 286.

with age;¹⁹¹ there are important reasons to acknowledge the resistance and independence expressed by sexually exploited youth at varying points of maturity, even if their resistance and independence are sometimes maladaptive. CSEC survivors deserve a level of agency within the state and non-governmental response to CSEC because best practices and research reveal that denying their complex reasons for entering “The Life,” paternalistically infantilizing them as helpless victims, and failing to provide them with the resources to make life choices outside of the sex trade, will ultimately fail to keep them safe from CSEC, to dissuade predatory adults, or to help their societal re-entry.¹⁹²

*A. A World of Contradictions: Historical Treatment of U.S.
Minors’ Consent to Sex*

U.S. society retains conflicting legal approaches to children’s status and their consent to sex as a result of complex historical traditions and cultural forces.¹⁹³ Early American legal treatment of children fell under the long-standing European doctrine of *parens patriae*, with remnants of The Elizabethan Poor Law of 1601.¹⁹⁴ Under *parens patriae* (literally, “parent of the country”), the state was responsible for all persons who were considered dependent, including minors, the disabled, and the mentally incapacitated.¹⁹⁵ For centuries, English common law had acknowledged the concept of diminished capacity—that children:

lacked many of the physical, mental, and moral resources of adults. To protect the young from their own bad choices, as well as from manipulation and exploitation of their immaturity by others, the law

¹⁹¹ See Drobac, *supra* note 181, at 11–19.

¹⁹² See, e.g., Godsoe, *supra* note 47, at 1323–42.

¹⁹³ MICHAEL GROSSBERG, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in A CENTURY OF JUVENILE JUSTICE 3–4 (Margaret K. Rosenheim et al. eds., 2002); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547 (2000).

¹⁹⁴ Grossberg, *supra* note 193, at 6–7.

¹⁹⁵ *Id.*

stripped underage persons of the power to make consequential decisions.¹⁹⁶

The Elizabethan Poor Law considered children to be the property of fathers, holding the family primarily responsible for child welfare but allowing for limited state assistance, particularly among the poor or (allegedly) morally suspect groups in society.¹⁹⁷ While white children in colonial America typically received care at home, worked in family-run or local agricultural ventures or apprenticeships, or obtained full state care in almshouses or orphanages, African-American children had few protections—and suffered mostly heinous abuse—as slaves.¹⁹⁸ The American Revolution ushered in Romanticism and new beliefs about the special innocence and needs of children as a class of dependents.¹⁹⁹ A new recognition of the mother-child bond and children's need for nurture began to burgeon at that time, amidst racial apartheid and patriarchal private and public domains.²⁰⁰

During the 19th century, more overtly racist, sexist, and classist conceptions of child welfare emerged, with a particular concern for the moral welfare of girls.²⁰¹ Judges and policymakers began to use the term “the best interests of the child,” distinguishing children as a uniquely vulnerable class of dependents under *parens patriae*.²⁰² Although still primarily falling within the realm of the private family, children began receiving increased, special intervention and protection from the state when a family purportedly failed.²⁰³ A vast humanitarian reform movement originating in the 1820s invoked the dual concepts of personal responsibility for poverty and crime, and collective social responsibility.²⁰⁴ The growth of a capitalist infrastructure via entrepreneurship and independent labor, the creation of

¹⁹⁶ LINDA HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 126 (1999).

¹⁹⁷ See Grossberg, *supra* note 193, at 6–7.

¹⁹⁸ *Id.* at 7.

¹⁹⁹ *Id.* at 7–8.

²⁰⁰ See Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 737 (2009); Grossberg, *supra* note 193, at 7.

²⁰¹ See, e.g., Grossberg, *supra* note 193, at 9–12, 17.

²⁰² *Id.* at 8.

²⁰³ *Id.* at 8–9.

²⁰⁴ *Id.* at 9.

state public schools, class divisions in the apprenticeship model, and the emergence of large-scale child and immigrant labor exploitation in industrial areas, created more divided perceptions of children.²⁰⁵ By the time New York City established the first juvenile reformatory in 1824, the U.S. had witnessed a true conflation of the needs and identities of dependent children and delinquent children.²⁰⁶

Reformatories and Houses of Refuge often kept youth until age 18 or 21 and largely pathologized families' alleged deviance in corrupting their own children.²⁰⁷ Girls, Native American, and African-American children were held separately in the name of preventing them from further temptation towards delinquency or sexual promiscuity.²⁰⁸ Other institutions and organizations focused on protecting children were likewise motivated by fear of "the dangerous classes," the growth of urban immigrant populations, and the breakdown of the traditional, white middle-class household.²⁰⁹ Awareness of the detrimental effects of child labor grew from the 1830s onward, with particularly strong child advocacy in New England.²¹⁰ Well into the late 1800s, child welfare and juvenile reform institutions featured harsh discipline and oppressive moral guidance.²¹¹

Hirshman and Larson's *Hard Bargains: The Politics of Sex* provides a rich historical context in which to view the U.S. governmental response to children's sexual activity with adults, from colonial times until 1999.²¹² These authors provide a historical, law-and-economics analysis of CSEC, of sex work by adult females, and of all male-female sexual relationships, beginning with the premise that:

the male-female distinction . . . divides players of observable, stable physical inequality and historical social inequality, which inequalities present specific

²⁰⁵ *Id.* at 9–11.

²⁰⁶ *See id.* at 16–18.

²⁰⁷ *Id.*

²⁰⁸ Grossberg, *supra* note 193, at 17.

²⁰⁹ *Id.*

²¹⁰ UNIV. IOWA, *Child Labor in U.S. History*, CHILD LAB. PUB. EDUC. PROJECT, https://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/us_history.html (last visited Feb. 8, 2016).

²¹¹ Grossberg, *supra* note 193, at 16–17.

²¹² HIRSHMAN & LARSON, *supra* note 196.

problems of political and moral philosophy. The sexual differences across numbers in size, weight, strength, and vulnerability to childbirth and nursing present the problem of bargaining between physical unequals over a physical transaction. The cultural differences in social power, economic resources and inherited historical presumptions present the problem of bargaining between economic, social and ideological unequals over an economic, social and ideological transaction All four categories of sexual acts we consider in detail throughout this book—rape, prostitution, adultery, and fornication—have been subject to bargaining throughout history. And in each instance, the law has established the parameters of those negotiations. All sexual bargaining takes place in the shadow of the law. Seen in this light, we may recognize all sex law as a restraint on liberty, especially of the stronger player.²¹³

Acknowledging the particularly unequal positions of adults and children in the exchange or “bargain” of sex, Hirshman and Larson assert that:

[A]dults as a class have more bargaining power than children Along with force, among the most egregious of bargaining imbalances is the adult who seeks sex with a child. In childhood and adolescence, a few years represents a lot of development, and age differences can mean great differences in reason, judgment, and power . . . the age inequality magnifies the risk of gender inequality in the heterosexual exchange. Children are so comparatively disempowered in their dealings with adults that adult-child sexual transactions can be compared to those obtained by the use of force as distortions of an ideal of equal bargaining power. Moreover, the consequences of

²¹³ *Id.* at 5, 259.

adult sex with adolescents and children affect society generally.²¹⁴

Hirshman and Larson's research reveals the extent to which U.S. laws and culture have both ignored and reinforced the disparities between children and adults in a sexual context. They find that age of consent laws for children in the U.S. stem from events surrounding adult female sex work in Britain and Civil War era America.²¹⁵ As the wartime exigencies raised supposed concerns about the health consequences of unregulated sex work and men's ability to find "clean" sex workers, American public health officials proposed a state licensing solution.²¹⁶ By the 1870s, the American anti-prostitution movement had responded, with inspiration from moral reform campaigns of the 1830s.²¹⁷ Feminists, clergy, and social reformers attacked tolerance for male promiscuity, creating the "social purity" movement.²¹⁸ The purity coalition definitively defeated regulated adult prostitution in the U.S. by the mid-1880s.²¹⁹ In subsequent years, sensational news exposes from Britain incited enthusiasm for addressing the commercial sexual exploitation of children in America, as well.²²⁰

Nineteenth Century U.S. reformers labored to improve age of sexual consent laws aimed to protect girls and remedy male sexual vice, while also tapping into contested gender politics among adults.²²¹ These moves rested on the centuries-old concepts of *parens patriae* and the diminished capacity of minors.²²² Historian Michael Grossberg asserts that rather than contradicting inherited gender discrimination, the U.S. application of *parens patriae* simply

²¹⁴ *Id.* at 259, 272.

²¹⁵ *Id.* at 124–25.

²¹⁶ *Id.* at 124.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 125.

²²⁰ *Id.* at 125–26.

²²¹ *Id.* at 125–132.

²²² *Id.*

reinforced “judicial patriarchy,” where the state supervised and controlled the fates of women and children.²²³ While age 21 was typically considered the boundary of full moral capacity in the 19th Century, rape law at that time only protected girls under age 10.²²⁴ As U.S. criminal statutes were codified, this tradition continued.²²⁵ Delaware shockingly had an age of consent of 7 years old.²²⁶ Rape was defined as a crime committed only against females, and under the age of consent, the mere fact of sex created strict liability for rape, or “statutory rape,” regardless of the child’s alleged consent or solicitation.²²⁷ Many of the same abolitionists who resisted African-American slavery became active in efforts to eradicate sexual exploitation of girls, overtly utilizing the slavery analogy.²²⁸ The American age-of-consent movement did not actually lead with arguments about child prostitution, however, but rather with arguments about the disparate legal treatment of female and male children.²²⁹ Ironically, in post-Reconstruction America, sexual stereotyping, sexual violence, and commercial sexual exploitation involv-

²²³ MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 236, 289-90 (1985).

²²⁴ HIRSHMAN & LARSON, *supra* note 196, at 126.

²²⁵ *Id.* at 126-28.

²²⁶ *Id.* at 126.

²²⁷ *Id.*

²²⁸ *Id.* at 126-27.

²²⁹ *Id.* at 124-127 (While the age of consent in commercial transactions for males was considerably protective, a girl was considered to be women at “the age at which she could be sexually penetrated without grievous physical injury. The markedly lower standard of protection for girls making sexual decisions communicated a powerful message about the law’s gendered vision of personhood and moral value: Men and boys had a moral and rational existence, but girls and women existed only as material creatures for sexual function. To purity reformers, this disparity in legal ages of consent also reflected the elevation of property interests over moral or personal interests. To thus elevate the sphere of market activity dominated by men over the sexual and familial arrangements that determined women’s well-being violated the ‘separate but equal’ argument that had justified the republic of virtue. By the late nineteenth century, the intellectual assumptions underlying *Democracy in America* were standard cultural fare; women’s sphere of family, church, and charity was as important to social order as the public sphere of politics and markets. How, then, could such legal favoritism be reconciled with Tocqueville’s claim that, despite submission in marriage, Americans still regarded women as the moral and intellectual equals of men?”).

ing women, children, and men of color remained prevalent, not unlike in most post-colonial societies, and helped to enforce racial and ethnic segregation.²³⁰

In 1885, the Woman's Christian Temperance Union (WCTU) launched a multi-faceted, national campaign to raise the age of sexual consent in all U.S. states and territories.²³¹ At times, WCTU activists reminded (male) legislators of their duty to protect women and exercise sexual restraint as an aspect of manhood.²³² By 1900, thirty-two states and territories had passed laws to raise the statutory age.²³³ Eleven states and territories had set the age of consent at 18 years old, including all those that had adopted some form of woman's suffrage.²³⁴ By the turn of the century, only three southern states still retained age 10 as the statutory age.²³⁵ However, Hirshman and Larson point out that sexual violations that did not fit neatly into the category of either forcible rape or statutory rape remained wholly lawful, and that construction, interpretation, and enforcement of sex crime laws at that time was generally narrow and often hostile towards victims.²³⁶

Many scholars document the subsequent split approach of U.S. courts, moral reformers, and lawmakers near the turn of the 19th Century, which helped to create the self-contradictory legal scheme around children and sex that exists today.²³⁷ While efforts persisted to protect middle or upper-class white girls from male sexual abuse and exploitation via age of consent laws and less effective sex crime statutes, contrary and discriminatory efforts focused on punishing girls—particularly those of racial and ethnic minority communities

²³⁰ See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 5, 9 (2d ed. 2000); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 *WOMEN'S RTS. L. REP.* 297, 297–98 (1992); Butler, *supra* note 146, at 124–25.

²³¹ HIRSHMAN & LARSON, *supra* note 196, at 127.

²³² See *id.* at 127–28 (discussing the nuances of the gender dynamics and cultural forces at play during these campaigns. “The sexual hierarchy remained constant, but the degree of inequality was subtly moderated”).

²³³ *Id.* at 128.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 132.

²³⁷ See generally *id.*

and socio-economic disadvantage—for underage sexual activity, incorrigibility, and prostitution.²³⁸ African-American, Native American, and immigrant women and children’s sexual autonomy and integrity remained widely unprotected.²³⁹ The prevalence of sexual violence, exploitation, and lynching was common.²⁴⁰

As child-savers inspired Chicago judges and policymakers to form the first juvenile court in 1899, and as juvenile courts sprang up throughout the country in the following decades, both the courts and their corresponding reformatories pushed traditional, white, middle-class norms upon African-American, immigrant, and poor families.²⁴¹ Although juvenile courts sought to rehabilitate, rather than strictly punish children who were wayward, harsh forms of incarceration persisted.²⁴² Training schools and reformatories placed impetus on moral guidance of impressionable youth, who were seen as more amenable to redirection than adult offenders.²⁴³ Public systems and subsidized private agencies began the present tradition of surveillance and intervention into the lives of marginalized communities in the name of preventing child maltreatment and delinquency.²⁴⁴ Historian Christine Stansell asserts that reformers ultimately made the “language of virtue and vice into a code of class.”²⁴⁵ Shifting demographics in the early 20th century sparked

²³⁸ *Id.* at 127–28, 130–31; see Butler, *supra* note 146, at 127; see also Godsoe, *supra* note 47, at 1323.

²³⁹ See generally Butler, *supra* note 146, 124–131.

²⁴⁰ See generally Butler, *supra* note 146.

²⁴¹ See Smith, *supra* note 75, at 1; HIRSHMAN & LARSON, *supra* note 196, at 137.

²⁴² See Smith, *supra* note 75, at 1, 4.

²⁴³ *Id.*

²⁴⁴ See Ellen Marrus & Laura Oren, *Feminist Jurisprudence and Child-Centered Jurisprudence: Historical Origins and Current Developments*, 46 HOUS. L. REV. 671, 691 (2009) (“Child-saving reformers of the Progressive era (from the 1890s to World War I) initiated a new phase in which they ‘greatly expanded public responsibility and professional administration of child welfare programs.’” These reforms “‘set precedents for the programs inaugurated by the New Deal.’” (quoting STEVEN MINTZ, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 156 (2004))); see also Smith, *supra* note 75, at 1, 4.

²⁴⁵ HIRSHMAN & LARSON, *supra* note 196, at 137 (quoting Christine Stansell) (internal citation omitted).

state law enforcement investigations and civic anti-prostitution campaigns.²⁴⁶ The influence of minority cultures, jazz music, more liberal sexual mores, and the rise of sexually transmitted diseases caused affluent whites to fear general cultural change and “white slavery,” or forced prostitution of white females at the hands of alleged, ethnic pimps or exploiters.²⁴⁷

By the early 20th century, both federal and state approaches to defending the bodily and sexual integrity of women and children became even more overtly racialized and classist.²⁴⁸ The first federal prostitution statute, the Mann Act in 1910, banned the transportation of “a woman across state lines for immoral purposes[,]” and was directed at eliminating “white slavery.”²⁴⁹ Meanwhile, African-American and predominantly immigrant communities were often plagued with “vice” problems that the white, mainstream media obsessively demonized, and that law enforcement did not address.²⁵⁰ A 1919 study of “Negroes” in Chicago asserted that Black girls and women were often pushed into sex work due to financial desperation and employment discrimination in other occupations.²⁵¹ The same study nevertheless asserted that African-Americans were more prone to sex crimes.²⁵² Jim Crow laws and lynchings both in the South and in other parts of the U.S. perpetuated images of white female sexual purity and Black male and female sexual deviance.²⁵³ Although women as a group gained voting rights in 1920 and had begun to enter the workforce and public sphere at much higher rates, racial, ethnic, and class distinctions starkly divided women’s experiences.²⁵⁴ Legal and social double-standards shielded “innocent” white children and women from sexual exploitation while simultaneously blaming children, women, and men of color for the vices of

²⁴⁶ *Id.* at 162

²⁴⁷ *Id.* at 162–63.

²⁴⁸ *Id.* at 162–64.

²⁴⁹ *Id.* at 164 (internal citation omitted).

²⁵⁰ See generally THE CHI. COMM’N ON RACE RELATIONS, THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT IN 1919 761–62 (1968).

²⁵¹ *Id.* at 331–32.

²⁵² *Id.* at 331–35.

²⁵³ Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1472 (2015).

²⁵⁴ See, e.g., *id.* at 1472.

prostitution, other crime, and social corruption.²⁵⁵ Black and ethnic civic organizations gained the strength and resources to address these matters throughout the 20th century; yet the remnants of the double-standard endure today.²⁵⁶

The current, self-contradictory legal approach to children's consent to sex with adults was thus formed through centuries of cultural, economic, political, and legal transformation, prejudice, and reform. Further, the aforementioned, confusing spectrum of maturity involving minors' overall rights and ability to consent has grown. A series of substantive due process cases in the early 20th Century sought to temper the State's *parens patriae* authority when competent parental authority over children was proven; but these cases did not deal with sex, and there was no acknowledgement of children's inherent agency or self-determination.²⁵⁷ Children's own rights to substantive and procedural due process and First Amendment expression have been eventually recognized by Supreme Court cases and a range of other judicial, legislative and executive measures in the 20th and 21st Century.²⁵⁸ Further, the *mature minor doctrine* has emerged, to enable children to direct their own medical treatment in the face of conflict within a family; and the process of emancipation allows youth to petition the state for adult status on an individualized basis.²⁵⁹ At the same time, our jurisprudence and statutes reinforce children's unique impressionability, immaturity, diminished culpability, and need for nurturance and guidance.²⁶⁰ Currently, the U.S.

²⁵⁵ See HIRSHMAN & LARSON, *supra* note 196, at 64-65, 287; Butler, *supra* note 253, at 1496-97.

²⁵⁶ Butler, *supra* note 253, at 1495-97.

²⁵⁷ See Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

²⁵⁸ See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *In re Gault*, 387 U.S. 1, 13 (1967); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-12 (1969); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (citing Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, 377 U.S. 288, 307 (1964)); Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); *In re E.G.*, 549 N.E.2d 322, 327-28 (Ill. 1989).

²⁵⁹ See Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 151 (2000); see also ALEXANDER M. CAPRON & IRWAN M. BIRNBAUM, 3-19 TREATISE ON HEALTH CARE LAW § 19.04 (Hooper Lundy & Bookman eds., 2016).

²⁶⁰ See, e.g., Roper v. Simmons, 543 U.S. 551, 568-70 (2005).

reinforces parents' essential role in making decisions in their children's lives, accepts children's ability to make limited, yet important decisions regarding their lives and participation in public life, and confirms their unique status as persons with incomplete human development and capacity.²⁶¹ While feminist influences have created many important reforms in sex law, such as less hostile evidentiary requirements for rape survivors and fewer First Amendment protections for child pornography, they have also joined with conservative influences to demonize sex offenders and exacerbate mass incarceration, often at the expense of minorities and the economically disadvantaged.²⁶²

Consequently, children of the exact same age are still seen simultaneously as persons with diminished capacity to consent to sex under the law (victims of statutory rape, sexual abuse, or corruption), and as persons guilty of paid (and purportedly consensual) sex with adults, which is considered prostitution.²⁶³ Minors are also routinely charged with perpetrating sex offenses and pimping although they remain technically too young to consent.²⁶⁴ Racist, xenophobic, and classist tropes have enabled public systems and law enforcement to prosecute primarily—but not exclusively—economically marginalized children of color for prostitution, sex crimes, or pimping, while enabling parents and the interventionist state to protect a broader range of children from statutory rape, exploitation, and other forms of sexual abuse by both adults and children.²⁶⁵ In short, for *some* children, consent to commercial sex is presumed, while other children are deemed incapable of consenting to commercial sex or sex generally.²⁶⁶ Elements of force, fraud, or coercion may be

²⁶¹ See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); G.A. Res. 61/146, at 1-2 (Dec. 19, 2006).

²⁶² See Ahmed, *supra* note 137, at 229; HIRSHMAN & LARSON, *supra* note 196, at 202.

²⁶³ See Butler, *supra* note 253, at 1498-99.

²⁶⁴ See Godsoe, *supra* note 47, at 1335-37.

²⁶⁵ See *id.* at 1336-37; Crenshaw, *supra* note 151, at 1436-38; Butler, *supra* note 253, at 1481, 1498-99; see also HIRSHMAN & LARSON, *supra* note 196, at 274-75.

²⁶⁶ See, e.g., Butler, *supra* note 253, at 1484-85, 1498-99.

presumed or denied, depending on the jurisdiction, circumstances, and child involved.

B. Analysis of Minors' Consent to CSEC or to Sex with Adults

Regardless of legal and historical legacies, the question remains: can minors ever consent to sex work, or to sex with adults generally? At this time, extensive research about children's physical, sexual, psychological, and social development, and about gender discrimination, reveal the need to break down the category of "children" or minors in response to this inquiry. While scholars Sacha Coupet, Ellen Marrus, and their contributing authors begin to address certain elements of this matter in their 2015 book Children, Sexuality and the Law, CSEC is not the focus of that work.²⁶⁷

Law and psychology typically make a strong distinction between persons over and under age 18, yet evidence also shows that humans continue maturing well into their mid-twenties, and that certain characteristics of youth in their teens can, at times, resemble those of adults.²⁶⁸ According to the Supreme Court in *Roper*:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between

²⁶⁷ Hazel G. Beh, *The Right to Comprehensive Sex Education*, in CHILDREN, SEXUALITY, AND THE LAW 166 (Sacha M. Coupet & Ellen Marrus eds., 2015); Sacha M. Coupet, *Policing Gender on the Playground*, in CHILDREN, SEXUALITY, AND THE LAW 193 (Sacha M. Coupet & Ellen Marrus eds., 2015); Jennifer Ann Drobac, *Consent, Teenagers, and Consequences*, in CHILDREN, SEXUALITY, AND THE LAW 48-52 (Sacha M. Coupet & Ellen Marrus eds., 2015).

²⁶⁸ MACARTHUR FOUND., *supra* note 77, at 2.

childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.²⁶⁹

Our society nevertheless continues to wrestle with the continuum of human maturity in setting boundaries and legal rules. However, science has more recently influenced the law—including Supreme Court opinions such as *Roper*— by pointing to adolescence as a unique stage of human development.²⁷⁰ While children are typically considered not responsible, and adults are presumed fully responsible, adolescents are deemed “somewhere in the middle, in a gray zone, so it is often not clear whether a particular adolescent is only somewhat less culpable than an adult charged with a comparable crime, or considerably less culpable.”²⁷¹ Adolescence describes the teenage years between 13 and 19, when people transition from childhood to adulthood.²⁷² However, physical and psychological changes during adolescence can start earlier, “during the preteen or “tween” years (ages 9 through 12).”²⁷³ The transitional period of adolescence features increased struggles with “independence and self-identity,” peer pressure, sexuality, social location,²⁷⁴ thrill-seeking, and “susceptibility to immature and irresponsible behavior,” accompanied by a “comparative lack of control over their immediate surroundings” (as compared with adults).²⁷⁵ Technically, neuroscientific and psychosocial research now shows that while cognitive abilities of adolescents typically resemble those of adults, “psychosocial” abilities that undergird decision-making change greatly over the course of adolescence and into the mid-twenties, having the greatest implication for mitigation of criminal culpability.²⁷⁶

²⁶⁹ *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

²⁷⁰ See generally *id.* at 569–75.

²⁷¹ Peter Ash, *But He Knew It Was Wrong: Evaluating Adolescent Culpability*, 40 J. Am. Acad. Psychiatry L. 21, 21 (2012).

²⁷² PSYCHOL. TODAY, *Adolescence*, <https://www.psychologytoday.com/basics/adolescence> (last visited Feb. 7, 2016).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Roper*, 543 U.S. at 553.

²⁷⁶ Smith, *supra* note 75, at 145 (citing MACARTHUR FOUND., *supra* note 77, at 2–3); see also MACARTHUR FOUND., *supra* note 77, at 2–3.

Ultimately, a scientific consensus is emerging that adolescents should be considered within a special legal category; that “the vast majority of offenders under the age of 18” should remain in juvenile court to account for their diminished culpability, developmental capacity, and amenability to rehabilitation and treatment, and that youth under age 18 are not as equally mature as adults.²⁷⁷ However, state and federal laws continue to splice the population of adolescents and pre-adolescent children into various categories for various reasons. As of 2014, eighteen states allowed children age 10 or younger to be adjudicated delinquent for their behavior, and thirty-three states did not specify a lowest age of juvenile court jurisdiction.²⁷⁸ As of 2011, some states still allowed youth age 10 or younger to be tried in adult criminal court for certain serious crimes, while many others try older preteens and teenagers in adult court.²⁷⁹ State ages of consent to sex now vary between age 16 and 18, with notable differences in tolerance for heterosexual and same-sex activity; and minors’ ability to exercise rights to medical decision-making, abortion, contraception, and myriad other matters, continues to range by state—often illogically and with younger age boundaries.²⁸⁰

Hirshman and Larson’s recommendation for CSEC and statutory rape law accounts for all these strands of thought, although it was written considerably earlier in 1999. They suggest that the age

²⁷⁷ See MACARTHUR FOUND., *supra* note 77, at 4 (Commonalities in the maturing process of most adolescents, along with the impracticalities of evaluating individual maturity in all juvenile crime cases, further confirm the consensus).

²⁷⁸ JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS, *Jurisdictional Boundaries*, <http://www.jjgps.org/jurisdictional-boundaries#compare-policy-boundaries?age=0&action=2&year=2013&state=52&offense=4> (last visited Feb. 7, 2016).

²⁷⁹ PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING, JUV. OFFENDERS AND VICTIMS: NAT’L REP. SERIES 4 (Sept. 2011).

²⁸⁰ See, e.g., Peter Clarke, *Age of Consent by State*, LEGAL MATCH, <http://www.legalmatch.com/law-library/article/age-of-consent-by-state.html> (last modified Oct. 9, 2014, 8:22 AM); Laws governing the civil emancipation of minors also vary by state and often are the sole way that minors can exercise contract rights, see *Emancipation of Minors – Laws: Laws of the Fifty States, District of Columbia, and Puerto Rico Governing Emancipation of Minors*, CORNELL UNIV. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_emancipation (last visited Nov. 2, 2016).

of consent to sex be 16 years old, and that statutory rape (the act of sex between a person over age 18 and a person under age 16) be a crime of strict liability, or “the equivalent of forcible rape.”²⁸¹ Children, in their proposal, would not be prosecuted for either sex with adults or with other minors, since a protective rationale applies equally to child perpetrators and victims if “the child, like an unconscious adult, is not mentally or morally competent to consent.”²⁸² As support for their proposal, Hirshman and Larson cite the longstanding legal and cultural acknowledgement of incapacity of age, “the dangers of abuse, fears of pregnancy and reputational exposure . . . the lack of fulfillment of romantic fantasies associated with sex for girls[,]” and the statistical prevalence of coerced and forced sex among underage females.²⁸³ They additionally point out that legal tolerance for sex between underage females and adult men gives girls a false impression that they can short-circuit the process of earning self-sufficiency and independence as women by relying on their own sexual objectification.²⁸⁴ After age 16, the proposal balances minors’ immaturity with “respect for the complex developmental tasks of adolescence with the pleasure demands of the maturing body . . . and the practical problems of enforcement.”²⁸⁵ Hirshman and Larson consider both female and male children under

²⁸¹ HIRSHMAN & LARSON, *supra* note 196, at 272.

²⁸² *Id.*

²⁸³ *Id.* at 273.

²⁸⁴ *Id.* at 273–74.

²⁸⁵ *Id.* at 274. (“In addition, we would reject the traditional common law defenses of mistake of age and promiscuity of the victim. Mistake of age is like silence in rape cases: Depending on where the burden of mistake is placed, either some older persons will have sex with partners too young to be proper sexual players, or, alternatively, some older persons (and their young partners) will miss the chance to enjoy some acceptable sexual experiences. Because our goal is to impose a duty of care on the stronger player, we expect the older person to discover the age of any potential sex partner. As to the younger player’s ‘promiscuity,’ our proposal does not rest on the value that a child places on himself or herself as reflected in prior sexual behavior. Nor do we value only sexually innocent children, a position that limits legal protection to kids lucky enough never to have been harmed by sex before. The entrapment defense remains available in cases of gross unfairness to defendants. Finally, children should never be treated as criminals for making the bad sexual choice to deal with an adult. The core of the incapacity of age idea is that children are not competent to defend their own interests against predatory adults in an unregulated marketplace, sexual, economic, or otherwise.”) *Id.* at 275.

age 16 to be equally incapable of consent to sex, despite lingering gender discrimination and double-standards.²⁸⁶

Line-drawing regarding sex between minors and further nuances in sexual relationships involving older children and adults is tricky and ongoing. Most experts on child sexual abuse assert that an age differential of five years or more between a child victim and a sexual aggressor constitutes an inherent dynamic of coercion, even when both parties involved are both under age 18 and when criminal ramifications are inappropriate.²⁸⁷ Certain states have tiered or bifurcated statutory schemes of sexual consent for youth, divide youth under age 18 into multiple categories, and account for both sexual autonomy among adolescents and the dangers of coercion among youth.²⁸⁸ In many cases, adults who have sex with children within a two-year age differential are not prosecuted.²⁸⁹ The nature of the sexual relationship, including the position of the older person, are also highly crucial to most states today, i.e., whether there is an inherent abuse of authority by the older person—such as a babysitter, teacher, or coach—and whether the parties consider themselves romantic equals or not.²⁹⁰ Yet, sex among minors and prostitution by minors remain widely criminalized.²⁹¹

Although many U.S. courts have found that state sexual consent laws are not relevant for purposes of interpreting their prostitution laws, in 2010 the Texas Supreme Court took a strong stance to the contrary. *In re B.W.* has received widespread attention from lawmakers and scholars, as the Texas Supreme Court therein held that children's special vulnerability makes them criminally non-labile for prostitution when they are below the age of consent, precisely

²⁸⁶ *Id.* at 274–75.

²⁸⁷ *See, e.g.,* MONICA L. MCCOY & STEFANIE M. KEEN, CHILD ABUSE AND NEGLECT 149 (2d ed. 2014).

²⁸⁸ *See e.g.,* Birkhead, *supra* note 12, at 1097–1100; *see also* FIND THE DATA, *Compare Age of Consent & Statutory Rape Laws by State*, <http://age-of-consent.findthedata.com> (last visited Sept. 20, 2016).

²⁸⁹ *See* ASPE, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 15, 2014), <https://aspe.hhs.gov/execsum/statutory-rape-guide-state-laws-and-reporting-requirements>.

²⁹⁰ *See id.*

²⁹¹ *See, e.g.,* Birkhead, *supra* note 12, at 12, at 1097–1100.

because minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.²⁹² The court in *In re B.W.* relied on U.S. Supreme Court precedent in *Roper* and *Graham*.²⁹³

Collectively considered, the aforementioned developments suggest that involvement with CSEC and prostitution by youth under age 18 should be decriminalized; that youth between ages 16 and 18 are often able to consent to sex, but nonetheless are incapable of fully grasping its repercussions; and that younger youth have a long way to go before reaching maturity.²⁹⁴ Children involved in prostitution and other forms of sex work should be considered in line with children depicted in child pornography—as the objects of exploitation, regardless of whether they allegedly consented. As previously mentioned, commercial sex and participation in pornography are both considered as forms of child trafficking in the U.S.²⁹⁵ When and if these youth are involved in the criminal justice system, they should receive the protection of “rape shield laws” so that evidence of their negative sexual histories cannot be used against them in court by exploiters’ and johns’ defense attorneys.²⁹⁶ The question

²⁹² *Id.* at 1095–96 (citing *In re B.W.*, 313 S.W.3d 818, 820–21 (Tex. 2010)).

²⁹³ *Id.* (citing *In re B.W.*, 313 S.W.3d 818, 820–21 (Tex. 2010)).

²⁹⁴ *But see* Amanda Peters, *Modern Prostitution Legal Reform & the Return of Volitional Consent*, 3 VA. J. CRIM. L. 1 (2015) (“In the last century, American prostitution laws focused exclusively on contractual consent rather than volitional consent or traditional *mens rea*. The laws’ failure to distinguish between voluntary and involuntary actors resulted in *de facto* strict liability charges, trials, and convictions for involuntary actors. Prostitution laws have undergone major reform in the past decade due to human trafficking concerns. As a result, states have enacted prostitution-specific safe harbor, affirmative defense, and expunction statutes designed to protect individuals forced or coerced into committing prostitution. This Article examines the pre-reform contractual nature of consent in prostitution cases, the reform’s return of *mens rea* to prostitution laws, and the historical underpinnings of volitional consent in prostitution jurisprudence. By distinguishing between individuals who choose to commit prostitution and those who do not, modern prostitution reform does more than merely safeguard against unjust convictions: it restores the element of volitional consent to its rightful place within the crime of prostitution.”) (emphasis added).

²⁹⁵ 22 U.S.C. § 7101(b)(2).

²⁹⁶ *See* Reid & Jones, *supra* note 74, at 222–23; *see also* 22 U.S.C. § 7101(b)(2).

then becomes how adults can best respond to persistent youth resistance to “rescue” from CSEC, and whether minors should have any level of agency in the U.S. legal and societal response to CSEC.

C. The Need to Acknowledge Minors’ Agency in Approaches to CSEC

Research done to date on native-born American youth involved in CSEC, while in its nascent stages, reveals that this population requires a wealth of emotional and educational support, a plethora of material support, and a keen acknowledgement of their own agency. More so than youth who have not experienced CSEC, youth survivors of CSEC have established certain levels of social autonomy, separation from traditional family relationships, and isolation from their non-exploited peers. Though they should be beyond the reach of criminalization, youth in CSEC should not remain completely beyond the reach of the child welfare, social services, and public health systems. Yet, obvious gaps exist in those approaches to this population. While not necessarily a thorough solution by themselves, civil law remedies can serve to close certain key gaps presented by criminal law, child welfare, and public health responses to CSEC, enabling youth to exercise agency and equipping them with resources to choose a different fate.

Although youth involved in CSEC have extensive needs that the child welfare and social services systems can partially address, empirical research to date exposes the limits of these systems’ responses. Sex workers of all ages describe their activities as being “in The Life” because they have established an all-encompassing lifestyle that alienates them from “squares,” or members of mainstream society not involved in the sex trade.²⁹⁷ Sex workers experience stigma from both squares and multiple public systems.²⁹⁸ Researchers in a study in the U.S. Midwest explain that:

[T]he streets provide support, albeit negative and life-altering. They offer places to sleep, ways to earn money, and a network of accepting others. . . . [T]ypical social service interventions . . . cannot compete with the underground network of players and their

²⁹⁷ VERY YOUNG GIRLS, *supra* note 47, at 15:55-16:15/01:09:29.

²⁹⁸ See, e.g., *id.* at 25:15-28/01:09:29.

continued system of support . . . Referrals to comprehensive social service programs must take place. Necessary social service interventions should include case management services, nonjudgmental support, and safe, long-term housing staffed by qualified, educated, and empathetic staff. Interventions must focus on trauma treatment, medication management, education, and job training.²⁹⁹

It is highly challenging for most local child welfare and social service programs to serve youth involved in CSEC if they are not in the custody of a biological or foster family or living in a group home while receiving intervention services. Legally, responsible adults must consistently compensate for the minors' status, which deprives them of contract and property rights.³⁰⁰ Secure funding for independent living programs for minors continues to evade social service systems.³⁰¹ Ironically, these youths have overwhelmingly fled or confronted family abuse or dysfunction, often due to family rejection of their sexual orientations, gender identities, or romantic relationships, and they remain the toughest children to place in foster and group homes.³⁰² CSEC survivors also go largely unrecognized

²⁹⁹ Celia Williamson & Michael Prior, *Domestic Minor Sex Trafficking: A Network of Underground Players in the Midwest*, 2 J. CHILD & ADOLESCENT TRAUMA 46, 58–59 (2009).

³⁰⁰ Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 547, 547 (2000); Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 266–269 (2014); Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 598–99 (2005) (“Laws frequently treat children differently from adults. Minors cannot drive, vote, serve in the military, marry, or skip school. Tort, contract, and criminal law all have special rules for minors, and family law assumes that minors will be subject to their parents’ supervision until they reach the age of majority.”).

³⁰¹ See, e.g., Elliott Gluck & Rricha Mathur, *Child Sex Trafficking and the Child Welfare System: First Focus*, ST. POL’Y ADVOCACY & REFORM CTR. 7 (2014), <http://childwelfaresparc.org/wp-content/uploads/2014/07/Sex-Trafficking-and-the-Child-Welfare-System.pdf>.

³⁰² See, e.g., Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1379–83 (2015); *Child Welfare and Human Trafficking*, U.S. CHILDREN’S BUREAU, CHILD WELFARE INFORMATION GATEWAY at 11 (July 2015), <https://www.childwelfare.gov/pubPDFs/trafficking.pdf>; *Needs of Rescued Child Traf-*

in child welfare, education, and justice systems.³⁰³ One Illinois study strongly articulated the tension that child welfare agencies face, asserting that the child protective goal of family reunification whenever safe often contrasts starkly with the best interests, safety, and stability of CSEC survivors.³⁰⁴ In that case, the study recommended that child protection agencies should increase their participation in human trafficking task forces, increase cooperation between parts of the same agency, update regulations and protocols, and enhance staff and program capacity to meet youths' needs.³⁰⁵ The justice system remains largely ill-equipped to deal with these youths' trauma and even further exacerbates that trauma.³⁰⁶ Extensive research has also established the failures and dangers of foster care, which include sexual and psychological abuse.³⁰⁷ Meanwhile, traditional public schools largely resist welcoming child survivors of CSEC back into classrooms due to fears that they will negatively influence other students and pose disciplinary problems.³⁰⁸

ficking Survivors, ARK OF HOPE FOR CHILDREN, <http://arkofhopeforchildren.org/child-trafficking/what-rescued-child-sex-trafficking-victims-need> (last visited Oct. 25, 2016).

³⁰³ See Kotrla, *supra* note 129, at 184.

³⁰⁴ Dawn Bounds, et al., *Commercial Sexual Exploitation of Children and State Child Welfare Systems*, 16 POL'Y, POL., & NURSING PRAC. 17, 21 (2015).

³⁰⁵ *Id.*

³⁰⁶ See, e.g., VERY YOUNG GIRLS, *supra* note 47, at 19:00-23:20/01:09:29; Press Release, U.S. Senator Orrin Hatch of Utah, *Hatch Introduces Legislation to Combat Domestic Youth Sex Trafficking* (Sept. 18, 2013), <http://www.hatch.senate.gov/public/index.cfm/2013/9/hatch-introduces-legislation-to-combat-domestic-youth-sex-trafficking>.

³⁰⁷ See, e.g., Joachim Hagopian, *The Failures of America's Foster Care System*, GLOBAL RESEARCH (July 19, 2014), <http://www.globalresearch.ca/the-failures-of-americas-foster-care-system/5392130>.

³⁰⁸ See, e.g., VERY YOUNG GIRLS, *supra* note 47, at 15:20-28/01:09:29; Hagopian, *supra* note 306; *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2114 (2003); see also Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children in Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 667-68 (1976) (stating that "a child left in foster care without a permanent home may be psychologically damaged by her uncertain status"); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1765 (1987).

Precisely because CSEC survivors feel a considerable (albeit sometimes maladaptive) level of independence, acceptance, and affirmation “in The Life,” and because they have typically exited abusive or unaffirming home environments,³⁰⁹ survivor-focused responses to CSEC must address youths’ needs for affirmation of their agency, dignity, individuality, and self-determination.³¹⁰ Comprising part of a large number of “independent children” in the U.S., CSEC survivors should be recognized as mature and resilient in their own right, and not infantilized or considered merely helpless victims in need of rescue. To be sure, these children are developmentally different from adults, have endured unacceptable harm, and often have mental health and substance abuse issues.³¹¹ Yet, when horrified and well-meaning responders over-pathologize CSEC survivors, this can lead to a form of paternalism which essentializes them based on overly simplistic conclusions based on biological factors, thus missing the most important aspects of the situation from the survivors’ own point of view. Similar to other youth who exhibit destructive behaviors, CSEC survivors possess a combination of strengths and needs and will require trust and responsibility to evolve into healthy adults.³¹² While CSEC survivors are certainly

³⁰⁹ See Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 275 (2008).

³¹⁰ See Marcus et al., *supra* note 127, at 7-8; Elizabeth Anne Wood, *Will New York Stop Treating Teen Prostitutes as Criminals?*, SEX IN THE PUBLIC SQUARE (May 9, 2007, 2:31 PM), <https://sexinthepublicsquare.wordpress.com/2007/05/09/will-new-york-stop-treating-teen-prostitutes-as-criminals/>; Birkhead, *supra* note 12, at 1107 (“When considering best practices for the prevention of child prostitution and commercial sexual exploitation, a critical step is for federal, state, and local governments to approach adolescent sexuality with more openness and less shame and evasion, as demonstrated by the MLMC project. After years of gains in the teenage birth rate and declines in contraceptive use among sexually active youth, it is evident that abstinence-only sex education has failed.”) (internal citations omitted); Schwartz, *supra* note 309, at 275.

³¹¹ Twill et al., *supra* note 96, at 189 (2010).

³¹² Smith, *supra* note 75, at 147-48 (citing numerous interviews with adolescent mental health professionals and youth rights advocates). *But see* Reid & Jones, *supra* note 74, at 224 (“To be found guilty of a crime in the United States, one must have the capacity to know right from wrong and control one’s behavior. [Child sex trafficking victims] are traumatized, entrapped, and prostituted by traffickers. Overwhelmed due to excessive biologically-based fear reactions, incapacitating dissociative states, psychosocial immaturity, and weak neurological

not adults and do need assistance, they deserve respect for their resilience and bravery in surviving the failures of the families and public systems that have touched their lives.

For these reasons, “carceral protectionist” approaches that label a child as a status offender, involve court scrutiny and surveillance, and seek to punish CSEC survivors under the cover of care,³¹³ should be replaced with responses that consider the youth’s own wishes and goals, are asset-based, do not cause further harm, and ensure that the youth’s needs are met.³¹⁴ Cognitive and behavioral training methods that help CSEC survivors improve their social skills, problem solve, and build relationships are vital.³¹⁵ Culturally competent, developmentally appropriate, trauma-informed care (TIC) is a promising approach to address the mental health effects of CSEC, while also building resilience, focusing on positive coping mechanisms, and attempting to decrease feelings related to loss of control in CSEC survivors.³¹⁶ A TIC may be crucial in “combating difficulties in engaging and retaining victims of CSEC and reintegrating CSEC survivors into mainstream society.”³¹⁷

Further, CSEC survivors’ leadership, in addition to their agency, is paramount in any efforts to effectively address the matter. Public health successes prove the efficacy of the involvement of “target populations” in systemic responses to public health issues, such as violence. Particular examples include the CDC’s four-level social-ecological model for preventing violence; U.S. anti-smoking campaigns; and World Health Organization programming for prevention of diseases.³¹⁸ Todres asserts that because much of what “independent” youth endure occurs away from adults, youth:

functioning, their ability to make rational decisions may be obstructed. This colluding configuration of historical, neurological, and developmental disabilities may compromise their use of logic and reason to control their own choices.”) (However, such over-medicalization and pathologizing of CSEC survivors’ situation runs the risk of further marginalizing them from society.).

³¹³ See Godsoe, *supra* note 47, at 1379–80.

³¹⁴ Todres, *supra* note 300, at 296–97.

³¹⁵ Twill et al., *supra* note 96, at 197.

³¹⁶ Bounds et al., *supra* note 304, at 22.

³¹⁷ *Id.*

³¹⁸ See Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 469–470, 488, 494–95 at n.220 (2011).

[C]an contribute valuable insights to our understanding of vulnerability and exploitation. Therefore, youth need a voice in the design, implementation, monitoring, and evaluation of programs. If we develop programs that make sense to adults but do not work for young people, ultimately the programs will fail, and we will fail our children.³¹⁹

Leaders of emerging, nationally recognized programs for CSEC survivors agree that survivor-led services, along with a support network of mentors, pro-social activities, and a social justice orientation towards the future, are essential. Yet, very few existing programs offer such services.³²⁰ Best practices in Positive Youth Development, general harm reduction, HIV/AIDS prevention and treatment, and youth behavior-change confirm these concepts.³²¹ The major contribution of youth in myriad social justice struggles in the U.S. has been generally overlooked and undervalued. Barbara Woodhouse asserts that:

³¹⁹ *Addressing Public Health*, *supra* note 113, at 107–08; *see also* United Nations Children’s Fund [UNICEF] Innocenti Research Ctr., *Child Trafficking in Europe: A Broad Vision to Put Children First* (Mar. 2008) (“Children’s experiences, recommendations and actions to prevent trafficking are often overlooked when developing programmes and initiatives designed to combat trafficking and to assist those children who have been trafficked.”); Mike Dottridge, *Young People’s Voices on Child Trafficking: Experiences from South Eastern Europe* vi (UNICEF Innocenti Research Centre, Working Paper No. IWP-2008-05 2008) (“[Children] are ‘experts’ on the factors that make children vulnerable, their reasons for leaving home, and their special needs regarding prevention, assistance and protection. Children and young people have an important role to play in helping to identify areas for intervention, design relevant solutions [,] and act as strategic informants of research.”); World Health Org. for Animal Health et al., *Contributing to One World, One Health: A Strategic Framework for Reducing Risks of Infectious Diseases at the Animal-Human-Ecosystems Interface* 32 (Oct. 14, 2008).

³²⁰ GEMS lecture, *supra* note 47; Birckhead, *supra* note 12, at 1106-10; *see also* Mia Spangenberg, *Prostituted Youth in New York City: An Overview*, ECPAT-USA 14 (2001); Carrie Baker, *Jailing Girls for Men’s Crimes*, MS. MAG. (Dec. 8, 2010), <http://msmagazine.com/blog/2010/12/08/jailing-girls-for-mens-crimes/>.

³²¹ *See, e.g.*, Benjamin Chambers, *Positive Youth Justice: A Model for Building Assets in the Juvenile Justice System*, RECLAIMING FUTURES (May 05, 2011), <http://reclaimingfutures.org/positive-youth-development-youth-justice-model>; Ahmed, *supra* note 137, at 256–58.

[c]hildren of all ages, but especially adolescents, have been key figures in American social justice movements, including the labor movement, the civil rights movement, the movement for gender equality, the movement for inclusion of persons with disabilities, and the struggle to secure equal access to education.³²²

Additionally, Part IV-A, *supra* and much other scholarship recounts the historical harm of excessive paternalism towards socially non-confirming children, the violation of their due process rights in child welfare and justice system efforts, and the racial, cultural and class dimensions of over-simplified child rescue endeavors.³²³

D. *The Missing Link: Youth Agency in Addressing the Needs of CSEC Survivors*

Youth agency's crucial missing link in the approach to CSCE can be found in civil law remedies. Combined with certain elements of child welfare services—such as adult support, trauma-informed programming, and guidance—yet, avoiding excessive social control or paternalism, civil law remedies can also entrust youth with the necessary civic empowerment and financial resources to determine their own futures. Civil law solutions could address underlying, structural reasons why youth are coerced into CSEC, yet why they nevertheless resist typical, more paternalistic, criminal law and child welfare “rescue” efforts and programs. While public health approaches are promising, they operate in more of a long-term manner and are unable to provide youth with immediate, concrete skills, funds, and resources to change their circumstances.³²⁴ Additionally, civil law solutions could make CSEC much less lucrative for exploiters, johns, and third parties by requiring them to pay survivors on the terms that survivors themselves dictate.³²⁵

³²² Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1568 (2009).

³²³ See, e.g., Godsoe, *supra* note 47, at 1379–83.

³²⁴ *Id.*

³²⁵ See, e.g., *Civil Litigation on Behalf of Victims of Human Trafficking*, S. POVERTY LAW CTR. (Nov. 20, 2008), <https://www.splcenter.org/20081201/civil-litigation-behalf-victims-human-trafficking#DAMAGES>.

Both scholars and service-providers who focus on CSEC point out that resources for legal advocacy, meeting basic health and safety needs, reintegration back into society, and “intensive residential treatment” are critical for this population.³²⁶ Many note that transitional living programs, followed by supervised independent living programs, are ideal.³²⁷ Still, existing programs of this kind remain extremely rare.³²⁸ When CSEC survivors are placed in foster homes or congregate care facilities, their resistance to treatment in a traditional child welfare context often causes behavioral management issues, results in placement instability, and further increases their risk of additional exposure to CSEC.³²⁹ Service providers have confronted challenges in helping this population maintain ties with positive friends, relatives, and associates, while protecting their physical safety.³³⁰ Reentry and reorientation into the youth’s community of origin, or safe relocation elsewhere, are essential and depend upon multiple public systems, informal support systems, and

³²⁶ See Bounds et al., *supra* note 304, at 22; DANK, ET AL., *supra* note 107, at 110; Birkhead, *supra* note 12, at 1109–10.

³²⁷ See, e.g., Birkhead, *supra* note 12, at 1110; Spangenberg, *supra* note 319, at 14.

³²⁸ Kotrla, *supra* note 128, at 184 (“One recent study on programs serving DMST victims located only four U.S. facilities that specifically served this population: Girls Educational and Mentoring Services’ Transition to Independent Living program in New York City; Standing Against Global Exploitation Safe House in San Francisco; Children of the Night in Van Nuys, California; and Angela’s House in a rural community outside of Atlanta. With a total of 45 beds between these organizations, most DMST survivors live in ‘residential treatment centers, child protective services—funded group homes and foster care placements, and juvenile corrections facilities.’”) (citations omitted); see Birkhead, *supra* note 12, at 1109–11; Spangenberg, *supra* note 320, at 14; Baker, *supra* note 320, at 3.

³²⁹ CHRIS CREEGAN ET AL., THE USE OF SECURE ACCOMMODATION AND ALTERNATIVE PROVISIONS FOR SEXUALLY EXPLOITED YOUNG PEOPLE IN SCOTLAND 3 (2005); Maddy Coy, *Young Women, Local Authority Care and Selling Sex: Findings from Research*, 38 BRITISH J. SOC. WORK 1408, 1410 (2008).

³³⁰ See generally Roya Ijadi-Maghsoodi & Mekeila Cook, et al., *Understanding and Responding to the Needs of Commercially Sexually Exploited Youth: Recommendations for the Mental Health Provider*, 25 CHILD ADOLESCENT PSYCHIATRY CLINIC N. AM. 107 (Jan. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4725731/> (discussing different treatment strategies involving family and friends).

independent living assistance.³³¹ Although the TVPRA reauthorized the 2005 provisions to support shelters for U.S. CSEC survivors, those provisions were never funded.³³² States persistently suffer from a lack of funding for housing and reintegration services for CSEC survivors.³³³ Although lawmakers are increasingly proposing legislation to fund housing for at-risk youth and CSEC survivors, their combined priority of funding law enforcement crackdowns and sex offender registration and notification continues to diminish the impact on prevention and survivor recovery.³³⁴

³³¹ See generally Leslie Briner, Lecturer, Univ. Wash., Univ. Wash. EBP Lecture Series: Sexual Exploitation and Trafficking of Youth (2016) (presentation available at <http://kingcounty.gov/~media/depts/executive/performance-strategy-budget/documents/pdf/RLSJC/2016/2016-01-28-Sexual-Exploitation-and-Trafficking-of-Youth-Presentation.ashx?la=en>).

³³² Kristin Finklea, Adrienne L. Fernandes-Alcantara, & Alison Siskin, *Sex Trafficking of Children in the United States: Overview and Issues for Congress*, CONG. RES. SERV. 9-10, CRS-14 (2015), <https://www.fas.org/sgp/crs/misc/R41878.pdf>.

³³³ Kotrla, *supra* note 129, at 184; Birkhead, *supra* note 12, at 1110–11; see also Spangenberg, *supra* note 320, at 1.

³³⁴ Press Release, U.S. Senator Maria Cantwell of Wash., *Cantwell Cosponsors Bill to Address Domestic Child Sex Trafficking in the Child Welfare System: Bipartisan Legislation Will Strengthen Reporting and Help Protect Vulnerable Children* (June 6, 2013), <https://www.cantwell.senate.gov/news/press-releases/cantwell-cosponsors-bill-to-address-domestic-child-sex-trafficking-in-the-child-welfare-system> (“ . . . cosponsored the Child Sex Trafficking Data and Response Act of 2013 introduced today along with U.S. Senators Ron Wyden (D-OR) and Rob Portman (R-OH). The legislation would improve state and national data on the scope and prevalence of child sex trafficking and to bring commonsense reforms to the child welfare system to better identify and assist victims of child sex trafficking and commercial exploitation. The bill is also being co-sponsored by U.S. Senators Richard Blumenthal (D-CT), Sherrod Brown (D-OH) and Mark Kirk (R-IL).”); Press Release, U.S. Senator John Hoeven of N.D., *Hoeven: Senate Passes Legislation to Support Victims of Human Trafficking, Child Pornography* (Apr. 22, 2015), <https://www.hoeven.senate.gov/news/news-releases/hoeven-senate-passes-legislation-to-support-victims-of-human-trafficking-child-pornography>; Press Release, U.S. Rep. Debbie Wasserman Schultz, *Wasserman Schultz Statement on JVT Senate Passage* (Apr. 23, 2015), <https://wassermanschultz.house.gov/press-releases/wasserman-schultz-statement-on-jvta-senate-passage/>; Press Release, Hatch, *supra* note 306.

Voices from multiple fields are beginning to recognize that CSEC can only truly be eliminated when underlying reasons for economic exploitation in general are addressed.³³⁵ Interestingly, early 20th century approaches to diminishing sex work involved “preventive strategies to address the conditions that lured women into prostitution,” including raising the minimum wage for female workers in eight states.³³⁶ In addition to the provision of survivor-led, trauma-informed therapies and supports, CSEC survivors require stable housing, life skills, and marketable vocational or employment skills in order to learn durable, legal methods of self-care and economic survival.³³⁷ The limited programs that offer such services, housing, and training have effectively reduced or prevented recidivism.³³⁸

The following civil law remedies offer a promising response to the complex matter of CSEC and bridge gaps in the dominant discourse and legal response. They avoid the pitfalls of theoretical analyses and legal responses that place perpetual victimhood on sexually exploited children, while acknowledging children’s coexistent vulnerability, resilience, and need for empowerment. Civil law remedies shift the economic “profit” of CSEC from exploiters, buyers, and third parties to a restorative and empowering tool for youth themselves.³³⁹ Although far from a quick fix, civil law remedies begin to put youth in control, while not leaving them unsupported.³⁴⁰ These remedies can potentially avoid the causes of youth resistance to criminal and child protective responses to CSEC, while providing

³³⁵ See, e.g., Bravo, *supra* note 4, at 548–49; Wood, *supra* note 310 (“Not only that, the law still separates sexual exploitation from other kinds of exploitation, and quite possibly will result in the release of youth ‘back into the community’ where they are forced to choose some other kind of exploitation as a way to earn an independent living. Until we solve the fundamental economic problems of our society, exploitation would seem to be a necessary condition of many lives. We should not be concerned only with exploitation of a sexual nature.”).

³³⁶ HIRSHMAN & LARSON, *supra* note 196, at 162–63

³³⁷ See Twill et al., *supra* note 99, at 197 (citing multiple additional studies); Marcus et al., *supra* note 127, at 243.

³³⁸ Twill et al., *supra* note 99, at 197 (citing multiple additional studies); Marcus et al., *supra* note 127, at 243.

³³⁹ See Mark Sidel, *Richard B. Lillich Memorial Lecture: New Directions In The Struggle Against Human Trafficking*, 17 J. TRANSNAT’L L. & POL’Y 187, 206 (2008).

³⁴⁰ *Id.*

the short-term resources absent from most longer-term, public health prevention campaigns. Civil law remedies can ultimately help diminish the fraught social, cultural, economic, and political inequities between CSEC survivors, adult offenders, and society at large.³⁴¹

V. PROMISING DEVELOPMENTS: CIVIL LAW REMEDIES FOR DOMESTIC CHILD SEX TRAFFICKING

Civil law remedies against exploiters, buyers, and third parties complicit in sexual exploitation are not a new concept; but they are essential to empowering survivors and preventing and addressing CSEC.³⁴² Civil law provisions for CSEC address the challenges posed by ineffective criminal law solutions, as well as those posed by paternalistic child protective approaches. Perhaps most importantly, civil law remedies respond to fundamental concerns about human development among marginalized groups. Self-described third-way feminist scholar Shelley Cavalieri notes that civil law solutions for sex trafficking incorporate the “capabilities approach” first articulated by Nobel Prize-winning economist Amartya Sen and feminist philosopher Martha Nussbaum.³⁴³ A theory now prominent in public policy and political philosophy, capabilities posits that fairness is not achieved through equality of outcome, but rather through the capability of individuals to live a variety of different kinds of lives, and individuals’ freedom to envision and bring to fruition a particular kind of life of his or her own choosing.³⁴⁴

³⁴¹ *Id.*; Kaethe Morris Hoffer, *A Response To Sex Trafficking Chicago Style: Follow The Sisters, Speak Out*, 158 U. PA. L. REV. 1831, 1843 (2010); Cavalieri, *supra* note 1, at 1452; *see generally* *Remedying The Injustices Of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2584–85 (2006).

³⁴² *See* Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combatting Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 294 (2011); Dysart, *supra* note 39, at 694–95; SHARED HOPE INT’L, *supra* note 36, at 7; Melissa Farley et al., *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1082–83 (2014); DANIEL WERNER ET AL., CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING (DRAFT) 6–7 (4th ed., 2015).

³⁴³ Cavalieri, *supra* note 1, at 1455–57.

³⁴⁴ Cavalieri, *supra* note 1, at 1455 (citations omitted); SEN, *supra* note 1, at 1–2; NUSSBAUM, *supra* note 1, at 4–5.

The civil law approach to CSEC importantly addresses the sources of gendered and sexual power imbalances, without imposing a unitary outcome, while actually increasing the life possibilities available to sexually exploited individuals. Civil law remedies also provide systematic solutions that enlarge the scope of a survivor's autonomy, alter systematized oppression, enable survivors to assert their own rights against exploiters, and help youth reclaim the profits of their exploitation for their own benefit.³⁴⁵ These civil law remedies directly respond to widespread, prevailing wisdom that a lack of housing and material resources for survivor re-entry, along with youth resistance to criminal law and child welfare programming that too often ignore agency and choice, are key reasons why youth cycle in and out of "The Life."³⁴⁶ Civil law remedies for CSEC also involve the fundamental understanding that CSEC and other forms of sexual and gender violence are civil rights issues.³⁴⁷

Although civil law remedies for sexual exploitation have existed in some form for over a century and currently exist federally, in at

³⁴⁵ See Cavalieri, *supra* note 1, at 1457.

³⁴⁶ See *supra* notes 330–335.

³⁴⁷ See MacKinnon, *supra* note 139, at 307; Mary G. Leary, *Mulieris Dignitatem: Pornography and the Dignity of the Soul—An Exploration of Dignity in a Protected Speech Paradigm*, 8 AVE MARIA L. REV. 247, 276–77 (2010) (discussing the efforts of Catharine MacKinnon and Andrea Dworkin in the 1980s: "As a result of their advocating for a different view of pornography, they were invited by two municipalities, Minneapolis and Indianapolis, to draft ordinances allowing for civil causes of action against the producers and those who profit from pornography. While these ordinances were ultimately unsuccessful, they represent an important shift in viewing pornography within a very different framework: as a civil rights issue."); Jill Laurie Goodman, *The Idea of Violence Against Women: Lessons from United States v. Jessica Lenahan, The Federal Civil Rights Remedy, and The New York State Anti-Trafficking Campaign*, 36 N.Y.U. REV. L. & SOC. CHANGE 593, 617–18 (2012); HIRSHMAN, & LARSON, *supra* note 196, at 288 ("Mary Louise Fellows, Beverly Balos, and Margaret Baldwin propose[d] the creation of a civil cause of action to allow a prostitute to recover money damages from a pimp for coercion into prostitution."); see also Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under The Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 438 (2011).

least 35 U.S. states, in Washington, D.C.,³⁴⁸ and abroad,³⁴⁹ they remain a vastly under-utilized tool, according to expert trafficking advocates and a growing number of scholarly voices.³⁵⁰ As of 2015, “trafficking victims have filed just over 140 cases in federal court.”³⁵¹ Of those cases, eleven or fewer involved sex trafficking.³⁵² Certain feminist scholars over time, including Catherine MacKinnon and Andrea Dworkin, have recommended civil causes of action by exploited women to recover monetary damages from a pimp who coerced them into sex work, or from producers and distributors of pornography.³⁵³ A civil remedy provision in the Violence Against

³⁴⁸ Martina Vandenberg, Webinar Address on Civil Legal Remedies and Criminal Restitution for Human Trafficking Victims, OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE 20 (Feb. 19, 2015).

³⁴⁹ See Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9 NW. U. J. INT’L HUM. RTS. 123, 131 (2011) (using the United Kingdom as a case study); Frances Simmons, *Making Possibilities Realities: Compensation for Trafficked People*, 34 SYDNEY L. REV. 511, 516 (2012).

³⁵⁰ Sidel, *supra* note 339, at 206; Vandenberg, *supra* note 348, at 14; WERNER ET AL., *supra* note 342, at 6, 9 (discussing how one international labor trafficking case ended in a \$14 million judgment in 2015); see Press Release, Southern Poverty Law Center, *Federal Jury in SPLC Case Awards \$14 million to Indian Guest Workers Victimized in Labor Trafficking Scheme by Signal International and its Agents* (Feb. 18, 2015), <https://www.splcenter.org/news/2015/02/18/federal-jury-splc-case-awards-14-million-indian-guest-workers-victimized-labor-trafficking>; see also Christopher P. Keleher, *The Illinois Predator Accountability Act: A Sleeping Giant*, 98 ILL. B.J. 582, 583 (2010); April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 253-56 (2007).

³⁵¹ WERNER ET AL., *supra* note 342, at 6.

³⁵² Martina E. Vandenberg, The Human Trafficking Pro Bono Legal Ctr., *Justice for Trafficking Victims: Criminal Restitution and Civil Litigation* (Oct. 13, 2015), http://c.ymcdn.com/sites/www.lawyersclubsandiego.com/resource/resmgr/MCLE_Documents/20151013.Justice_for_Traffic.pdf; see WERNER ET AL., *supra* note 342, at 6.

³⁵³ See Leary, *supra* note 347, at 276 (Discussing the efforts of Catharine MacKinnon and Andrea Dworkin in the 1980s: “As a result of their advocating for a different view of pornography, they were invited by two municipalities, Minneapolis and Indianapolis, to draft ordinances allowing for civil causes of action against the producers and those who profit from pornography. While these ordinances were ultimately unsuccessful, they represent an important shift in viewing pornography within a very different framework: as a civil rights issue.”); Goodman, *supra* note 347, at 614; Cavalieri, *supra* note 1, at 288; HIRSHMAN & LARSON, *supra* note 196, at 288 (“Mary Louise Fellows, Beverly Balos, and Mar-

Women Act raised heightened awareness of the promise of civil law in addressing sexual and gender violence before being hotly contested across the country and eventually failing in the courts.³⁵⁴ Bravo, Hirshman and Larson, among others, suggest a labor regulation model that “would open patrons, pimps, club owners, landlords, and others on the business end of the sex industry” to repeated civil penalties.³⁵⁵ However, insufficient attention has been given to civil law solutions for CSEC in particular.

Both federal and state statutes enable civil law remedies for CSEC.³⁵⁶ The TVPA of 2003 initially authorized civil suits against traffickers, and the TVPRA of 2008 includes 18 U.S.C. § 1595, which permits trafficking survivors to “recover damages and reasonable attorney fees” from exploiters and other individuals or corporations complicit in trafficking.³⁵⁷ Third party affirmative knowledge of trafficking is not required, and the statute includes those who “should have known,” and applies even after a criminal case has terminated.³⁵⁸ Further, a Federal Private Right of Action exists under 18 USC § 1595, where survivors can sue for damages (including punitive damages) and attorneys’ fees in U.S. District Court.³⁵⁹ The date of the statute governing the suit depends on the date of the case involved, and the TVPA eliminates a need to use RICO statutes.³⁶⁰

Civil law remedies for CSEC can thus hold multiple parties involved accountable, serve as a deterrent based on the financial and reputational risks involved, compensate survivors for the damage they have suffered, offset survivors’ “ongoing costs for treatment

garet Baldwin propose[d] the creation of a civil cause of action to allow a prostitute to recover money damages from a pimp for coercion into prostitution.”); MacKinnon, *supra* note 139, at 274;

³⁵⁴ See Caroline S. Schmidt, *What Killed the Violence Against Women Act’s Civil Rights Remedy Before the Supreme Court Did?*, 101 VA. L. REV. 501, 524-33 (2015).

³⁵⁵ HIRSHMAN & LARSON, *supra* note 196, at 302; see Bravo, *supra* note 147, at 583; Bravo, *supra* note 4, at 557-58;

³⁵⁶ Vandenberg, *supra* note 348, at 20.

³⁵⁷ 18 U.S.C. § 1595(a) (2012).

³⁵⁸ *Id.*

³⁵⁹ *Id.*; Vandenberg, *supra* note 348, at 24.

³⁶⁰ Vandenberg, *supra* note 348, at 21.

and rehabilitation,” and fund essential survivor housing and reintegration.³⁶¹ Experts from The Southern Poverty Law Center and Loyola Law School of Los Angeles assert that civil litigation “offers the opportunity to obtain lost wages, compensation for emotional distress and physical injuries, and other monetary damages, including punitive damages.”³⁶² They recommend a variety of civil tort claims, quasi-contract claims, and state statutory claims.³⁶³ Further, statutes of limitation for actions by CSEC survivors should be eliminated or extended, as these youths often take considerable lengths of time to diminish their psychological bonding with an exploiter and to comprehend the full scope of the damage done.³⁶⁴ There are various models for such civil suits, including class actions by groups of CSEC survivors and individual suits.³⁶⁵ Settlements and jury awards may be distributed to survivors individually, or into state or local funds that handle safe houses, survivor services, data collection and reporting. Ideally, civil suits should maximize a survivor’s agency in directing the case strategy and allocating the financial award.³⁶⁶

However, there are drawbacks of civil suits by CSEC survivors. Certainly, such suits require extensive assistance for youth by pro bono attorneys, other legal service providers, advocacy organizations, public systems, and other supportive adults.³⁶⁷ Youth have previously worked with guardians *ad litem* to build their cases.³⁶⁸ Lengthy civil litigation can be traumatic and raises privacy and

³⁶¹ Smith & Vardaman, *supra* note 342, at 276, 279, 294; *see, e.g.*, Simmons, *supra* note 349, at 538–39; Anna Williams Shavers, *Human Trafficking, the Rule of Law, and Corporate Social Responsibility*, 9 S.C. J. INT’L L. & BUS. 39, 51 (2012); George & Smith, *supra* note 16, at 75.

³⁶² WERNER ET AL., *supra* note 342, at 6 (“Both the Ninth and Tenth Circuit Courts of Appeal have upheld the availability of punitive damages under the Trafficking Victims Protection Act civil remedy. *See Francisco v. Susano*, 525 Fed. Appx. 828, 835 (10th Cir. 2013); *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011).”).

³⁶³ *Id.* at 146–54.

³⁶⁴ Smith & Vardaman, *supra* note 342, at 294; Dysart, *supra* note 39, at 676.

³⁶⁵ *See* Vandenberg, *supra* 344, at 26.

³⁶⁶ *Id.* at 21.

³⁶⁷ WERNER ET AL., *supra* note 342, at 9.

³⁶⁸ *See, e.g., Role of Guardian Ad Litem*, GUARDIAN AD LITEM <http://www.galpbc.org/role-of-guardian-ad-litem.html> (last visited Sept. 24, 2016).

safety concerns as survivors face their exploiters.³⁶⁹ There is the possibility of failed financial recovery even in the event of successful litigation, depending on whether exploiters, johns, and third parties actually have the resources to fulfill settlements or jury awards.³⁷⁰ A civil case may need to be stayed during a pending federal criminal case, and the possibility of counter-claims abounds.³⁷¹ Additionally, corporations that host or manage websites that facilitate CSEC, such as Backpage.com, have Communications Decency Act immunity from liability for the harm caused to survivors; and courts have asserted that legislatures are responsible for changing that liability statutorily.³⁷² The lower evidentiary burden involved in civil suits and the greater focus on damages as a remedy can still be far more useful to a CSEC survivor than solely incarcerating offenders and providing limited social services for recovery.³⁷³

Although potentially less potent as a method of survivor empowerment, criminal restitution is mandatory in trafficking cases under TVPA 18 USC § 1593.³⁷⁴ The DOJ has issued an official statement saying that securing restitution for trafficking survivors is essential to a victim-centered approach to trafficking investigations and prosecutions.³⁷⁵ Criminal restitution can cover all income earned for the sex trafficker, in addition to costs incurred by the survivor for medical and mental health services, transportation, housing, child care, attorneys' fees, and other losses incurred as a proximate result of the exploitation.³⁷⁶ Damages are both future-looking and backwards-looking.³⁷⁷ Further, in *U.S. v. Cortes-Castro*, the 11th Circuit confirmed that defendants cannot argue that CSEC falls under "illegal

³⁶⁹ WERNER ET AL., *supra* note 342, at 7.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *M.A. ex rel. P.K. v. Village Voice Media Holdings*, 809 F. Supp.2d 1041, 1058 (E.D. Mo. 2011).

³⁷³ Kara, *supra* note 349, at 143 n. 154 (using the United Kingdom as a case study).

³⁷⁴ 18 U.S.C. § 1593(b) (2012).

³⁷⁵ Katelyn Polantz, *Human Trafficking Cases Rarely Result in Restitution, Study Says; A Survey of Nearly 200 Cases Largely Puts Blame on Federal Prosecutors*, NAT'L LAW J. (Oct. 6, 2014).

³⁷⁶ See 18 U.S.C. § 1593 (2012); Vandenberg, *supra* note 348, at 8.

³⁷⁷ Vandenberg, *supra* note 348, at 9; see, e.g., *U.S. v. Lewis*, Case No. 1:09-cr-00213-EGS, at 36-37 (D.D.C. Mar. 30, 2011).

activities” and thus not applicable to restitution orders.³⁷⁸ Yet, prosecutors often apply the incorrect statute in trafficking cases and unwittingly prevent restitution.³⁷⁹ Interestingly, because criminal restitution orders under the federal trafficking statute are tax-free for purposes of federal income tax, they may technically be more valuable than a taxable civil judgment in the same amount.³⁸⁰ CSEC survivors would need significant adult assistance in identifying assets and calculating restitution owed.³⁸¹ Expert practitioners also advise survivor attorneys to monitor collection by federal authorities.³⁸²

Restitution also remains a highly under-utilized tool in CSEC cases.³⁸³ An October 2014 study by The Human Trafficking Pro Bono Legal Center found that federal prosecutors did not seek restitution in 37% of qualifying cases (of human trafficking generally) brought between 2009 and 2012.³⁸⁴ When the prosecutor did not seek restitution, it was granted in only 12% of cases; yet, requests for restitution through a prosecutorial memorandum, a governmental sentencing memorandum or other written submission, or a plea agreement yielded considerable success.³⁸⁵ This under-use of restitution is partly due to the strict requirements for specificity, including receipts for “out-of-pocket” expenses like medical or housing costs.³⁸⁶ A defendant’s ability to pay is irrelevant under § 1593, as opposed to another criminal restitution statute.³⁸⁷

CSEC survivors can also make better use of certain criminal measures that have broad civil impact, such as criminal asset forfeiture.³⁸⁸ Asset forfeiture also has the advantage of preventing the offender from keeping assets and property related to the commission

³⁷⁸ United States v. Cortes-Castro, 511 Fed. App’x 942, 947 (11th Cir. 2013).

³⁷⁹ See Vandenberg, *supra* note 348, at 14-15.

³⁸⁰ WERNER ET AL., *supra* note 342, at 8.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Kavita Desai, *Legal Strategies in the Fight to End Human Trafficking*, 3 HOUS. L. REV. 33, 45 (2013).

³⁸⁴ ALEXANDRA F. LEVY & MARTINA E. VANDENBERG, HUMAN TRAFFICKING PRO BONO LEGAL CTR., WHEN “MANDATORY” DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 5 (2014).

³⁸⁵ *Id.*

³⁸⁶ See WERNER ET AL., *supra* note 342, at 8.

³⁸⁷ See Vandenberg, *supra* note 348, at 13.

³⁸⁸ See Smith & Vardaman, *supra* note 342, at 294.

of the exploitation or obtained through proceeds of the exploitation.³⁸⁹ While various limitations exist regarding what property is covered under CSEC and trafficking asset forfeiture statutes, some jurisdictions are broadening the scope of those statutes; many put the proceeds into general funds for survivor services.³⁹⁰

While the recently enacted Federal Justice for Victims of Trafficking Act of 2015 provides additional avenues for the funding of survivor services through civil law type financial penalties for offenders, the statute still features an over-reliance on criminal sanctions and incentives for survivor participation in criminal cases.³⁹¹ The statute levies a “special assessment” fine of \$5,000 on any federal offender convicted of human trafficking, child sexual exploitation, child pornography, sexual abuse, interstate transportation for illegal sexual activity, or commercial human smuggling.³⁹² Shared Hope International points out that this measure is an improvement from the prior status quo, wherein “only 12% of federal child pornography/prostitution offenders and 6% of sexual abuse offenders are ordered to pay any criminal fines at all in federal court” as of fiscal year 2012.³⁹³ This assessment provision should collect at least an estimated \$31 million according to the Federal Sentencing Commission; and the assessments would not be payable until all other criminal restitution and fines were paid by offenders.³⁹⁴ The assessments will be collected through existing avenues for collecting criminal fines and will go into a deficit-neutral Domestic Trafficking Victims’ Fund.³⁹⁵

However, the Domestic Trafficking Victims’ Fund mentioned in the new statute will largely fuel additional law enforcement efforts and problem-solving human trafficking courts, along with “victim

³⁸⁹ *Id.*

³⁹⁰ Scott Davidson Dyle, *Beginning To Seize The Instrumentalities Of Human Trafficking: Chapter 514 Allows Criminal Forfeiture Of Property Used To Facilitate The Sex Trafficking Of Minors*, 44 MCGEORGE L. REV. 575, 577 (2013).

³⁹¹ See Justice for Victims of Human Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

³⁹² *Id.*

³⁹³ SHARED HOPE INT’L, JUSTICE FOR VICTIMS OF HUMAN TRAFFICKING ACT: SECTION-BY-SECTION ANALYSIS 1 (2015) (citing U.S. SENTENCING COMM’N, GUIDELINES MANUAL, §3E1.1 at 204 (Nov. 2012)).

³⁹⁴ *Id.* at 2.

³⁹⁵ *Id.*

services,” through the “[v]ictim-centered Child Human Trafficking Deterrence Block Grant Program.”³⁹⁶ The considerable flaws in law enforcement efforts and human trafficking courts have been discussed, *supra* in Part II at length; and experts such as Todres and Chacon suggest that a failure to expressly prioritize survivor-centered efforts will make a marginal impact, at best.³⁹⁷ The law also amends the human trafficking asset forfeiture statute (18 U.S.C. § 1594) to account for money laundering (18 U.S.C. § 982(a)(1)), “eliminating the need for prosecutors to show direct traceability between the underlying crime and the targeted proceeds when they can show that the assets were involved in the crime or used to conceal the source of criminal assets.”³⁹⁸ Shared Hope International suggests that the measure will increase the amount of forfeited criminal assets available for survivor restitution and “incentivize the charging of human trafficking as the principal offense in federal cases.”³⁹⁹ The statute also requires the Department of Justice and federal judicial trainings to include instruction on seeking and ordering restitution in trafficking cases.⁴⁰⁰

Contrary to best practices, the 2015 Justice for Victims of Human Trafficking Act notably empowers law enforcement officials and the criminal justice system to more stringently penalize traffickers and buyers while expanding their own resources.⁴⁰¹ The law adds the words “solicits or patronizes” to the TVPRA to clarify that purchasers are “sex trafficking offenders” in need of full prosecution and conviction; encourages law enforcement to consider trafficking offenses “crimes of violence” for purposes of FBI reporting and federal pre-trial release and detention; and creates mandatory minimum sentences for conspirators.⁴⁰² Title III, the HERO Act,⁴⁰³ authorizes the Immigration and Customs Enforcement (ICE) Cyber Crimes

³⁹⁶ *Id.*

³⁹⁷ *Widening Our Lens*, *supra* note 89, at 55; Todres, *supra* note 50, at 570–71; Chacón, *supra* note 89, at 1652–53.

³⁹⁸ SHARED HOPE INT’L, *supra* note 393, at 3.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 2, 7.

⁴⁰¹ *See id.* at 1–5.

⁴⁰² *Id.* at 3–7.

⁴⁰³ Human Exploitation Rescue Operations Act of 2015, Pub. L. No. 114-22, § 302, 129 Stat. 251, 251, 255 (2015).

Center to collaborate with the Department of Defense and the National Association to Protect Children in recruiting, training, and hiring military veterans as law enforcement officials in CSEC cases.⁴⁰⁴ Although state and local law enforcement agencies have been widely criticized for increased militarization and general mishandling of CSEC, largely funded by federal initiatives,⁴⁰⁵ this federal statute singles out military veterans as being particularly qualified for law enforcement work on CSEC cases.⁴⁰⁶

There is a modest improvement upon prior anti-trafficking law in the Justice for Victims of Trafficking Act's verbal acknowledgment of the need for survivor leadership and services in the prevention of CSEC,⁴⁰⁷ yet, these concepts are not meaningfully incorporated. Section 115, the Survivors of Human Trafficking Empowerment Act, establishes a national Advisory Council on Human Trafficking, which is to be "composed of not less than 8 and not more than 14 individuals who are survivors of human trafficking," that will make recommendations to the government and will advise the Senior Policy Operating Group (SPOG) in the Department of State's Trafficking in Persons Office (TIP).⁴⁰⁸ However, funding remains unrelated to survivor advising or agency and it is unclear if or how the Advisory Council's recommendations will be implemented or trickle down to states.

Although certain elements of this new federal statute may appear proactive, the statute reflects continued complacency regarding criminal law's effect on CSEC. Section 201 amends the Runaway and Homeless Youth Act so that existing grant resources can be used to train staff on the link between youth homelessness and CSEC,

⁴⁰⁴ *Id.*

⁴⁰⁵ See AMERICAN CIVIL LIBERTIES UNION (ACLU), WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 16 (2014); Bret McCabe, *Does the Militarization of American Police Help Them Serve and Protect?*, JOHN HOPKINS MAG., Spring 2015, at 1-4; J. Berkeley Bentley & Arthur Rizer, *The Militarization of the Police: Is it a Battle of Equipment or Mentality?*, THE HUFFINGTON POST (May 22, 2016), http://www.huffingtonpost.com/arthur-rizer/the-militarization-of-the-police_b_7425432.html.

⁴⁰⁶ Human Exploitation Rescue Operations Act § 302 at 255.

⁴⁰⁷ See Justice for Victims of Human Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

⁴⁰⁸ § 115, 129 Stat. at 243.

and to also fund street outreach;⁴⁰⁹ while Section 224 clarifies that an existing TVPA grant can be used to provide housing services to survivors.⁴¹⁰ Section 222 also directs the Interagency Task Force to Monitor and Combat Trafficking, established under the TVPA to survey federal and state activities for CSEC prevention elements, review academic literature on deterrence and prevention, identify best practices and strategies in prevention, and identify gaps in research and data.⁴¹¹ However, those provisions neither provide new funding for prevention or survivor housing nor explicitly link survivor leadership to the Interagency Task Force's efforts, despite persistent reports from survivors, services providers, and states that existing funding and administrative configurations are insufficient. Further, the Justice for Victims of Trafficking Act contains provisions allowing trafficking survivors who were convicted of non-violent offenses related to their trafficking to vacate their arrest and conviction records, suggesting that Congress and the Obama Administration expect continued criminalization of survivors.⁴¹²

Some practitioners have recently suggested other civil law remedies for addressing CSEC. Dale Margolin Cecka suggests that former foster youth who are CSEC survivors should have 14th Amendment due process claims against state agencies for their failure to protect them during foster care.⁴¹³ A U.S. Department of Transportation staff attorney has recommended that the commercial drivers' license privileges of traffickers and buyers involved in CSEC—particularly at truck stops, which are notorious sites—be revoked by states and the Federal Department of Transportation.⁴¹⁴

While pragmatists rightfully argue that it is extremely difficult to litigate a multiplicity of civil actions by CSEC survivors, and to exact restitution and fiscal penalties from criminal defendants, such

⁴⁰⁹ See SHARED HOPE INT'L, *supra* note 393, at 8.

⁴¹⁰ *Id.* at 9.

⁴¹¹ *Id.*

⁴¹² Justice for Victims of Human Trafficking Act of 2015, Pub. L. No. 114-22, § 1002, 129 Stat. 227, 266 (2015).

⁴¹³ Dale Margolin Cecka, *The Civil Rights of Sexually Exploited Youth in Foster Care*, 117 W. VA. L. REV. 1225, 1253-56 (2015).

⁴¹⁴ Alicia Wilson, *Using Commercial Driver Licensing Authority to Combat Human Trafficking Related Crimes on America's Highways*, 43 U. MEM. L. REV. 969, 1011 (2013).

arguments do not diminish the potential effectiveness of civil solutions to CSEC. The proven damage done by criminal law approaches to CSEC is both exorbitant and ineffective. Yet, both state and non-state actors need to engage ways to diminish the lucrative-ness of CSEC among buyers, exploiters, and third parties. Civil law remedies offer an empowering and more immediately useful alternative, or at least a necessary addition, to paternalistic child welfare responses and longer-term public health programming. A majority of sources agree that survivor resistance and trauma from criminal law and child welfare responses, combined with a lack of fiscal support for housing, health services, legal advocacy, and skill-building, are the most persistent obstacles to survivor re-entry. Civil law remedies begin to put the tools for new life paths into the hands of youths who are both resilient and vulnerable, and in need of extensive support. Further, there is abundant potential for the creation of new civil law remedies and more imaginative, collaborative administration of damage awards and other restorative resources for CSEC survivors.

CONCLUSION

Knee-jerk criminal law approaches to CSEC have failed to address the complex, deep roots of the problem while exacerbating its impact. The conspicuously convenient and dominant legal, scholarly, and public rush to demonize offenders who exploit or buy children in the sex trade continues to mask the mundane identity of johns and the higher prevalence of sexual violence in more intimate and seemingly innocuous settings in U.S. society. While the sexual exploitation of children is certainly unacceptable, over-simplification of the issue and the required solutions has prevented an effective response. This Article joins growing critiques of criminal law responses to CSEC, while illuminating persistent gaps in existing analyses and alternatives. Evidence suggests that civil law remedies for CSEC can avoid certain pitfalls of criminal and child protective responses, while empowering survivors directly and enhancing longer-term, public health programming.⁴¹⁵ Although not a quick fix in themselves, civil law remedies for CSEC are vastly under-utilized, yet offer crucial and missing resources, redistributive justice,

⁴¹⁵ See *supra* Part V.

and offender deterrence. Ultimately, analysis of the scholarly and legal response to CSEC and its structural, persistent roots reveals a need to constantly question assumptions and reflexive responses. Reliance on over-simplistic concepts and solutions will likely perpetuate both CSEC and other less sensationalized forms of sexual violence and oppression.