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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

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

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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.

INTRODUCTION .......................................................... 4

I. THE PROBLEM OF DOMESTIC CHILD SEX TRAFFICKING .... 6
   A. Definitions and Legal Landscape ................................ 6
   B. The Scope of the Problem, and the Measurement Dilemma .......................................................... 9

II. THE CRIMINAL LAW AS A QUICK FIX ................................ 13
   A. Failed Offender Reform ........................................... 15
   B. Direct Harm to CSEC Survivors ................................ 19
   C. Indirect Harm to CSEC Survivors ............................... 23
   D. Avoidance of the Root Causes of CSEC ....................... 24
   E. Socio-cultural and Socio-economic Roots of CSEC ........ 25

III. THEORETICAL DIMENSIONS OF DOMESTIC CHILD SEX
    TRAFFICKING .......................................................... 31
   A. A Gap in the Theoretical Discourse ............................. 31
   B. Feminist Theory .................................................... 33
   C. Critical Race Feminism ............................................. 35
   D. Vulnerability Theory ................................................ 38

IV. WRESTLING WITH A CRUCIAL QUESTION:
   WHO IS THE “CHILD” IN CSEC? .................................... 41
   A. A World of Contradictions: Historical Treatment of U.S. Minors’ Consent to Sex ......................... 43
   B. Analysis of Minors’ Consent to CSEC or to Sex with Adults .............................................................. 54
   C. The Need to Acknowledge Minors’ Agency in Approaches to CSEC ..................................................... 60
   D. The Missing Link: Youth Agency in Addressing the Needs of CSEC Survivors ...................................... 66

V. PROMISING DEVELOPMENTS: CIVIL LAW REMEDIES FOR
   DOMESTIC CHILD SEX TRAFFICKING ............................. 70

CONCLUSION ................................................................. 81
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” 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-

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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. 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. 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.

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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

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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. 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. 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. In states that prosecute children for prostitution, there is a presumption of a child’s consent to a commercial sex act. 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. Yet, most anti-trafficking advocates and human rights entities find the FFC requirement to be highly inappropriate and abusive. The international human rights and humanitarian commu-

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11 Dempsey, supra note 6, at 211–12.
14 Id. at 839.
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.\(^\text{16}\)

**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.\(^\text{17}\) “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.”\(^\text{18}\) 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.”\(^\text{16}\)


\(^{18}\) *Id.*
Globally, the International Labor Organization estimates that there are 4.5 million people trapped in forced sexual exploitation. The exact number of CSEC survivors in the United States is unknown because of challenges in defining the population and varying methodologies used to arrive at estimates. 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.

“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.” The value of global human trafficking, which involves both children and adults, is an estimated $32 billion - a per-year industry with tax-free earnings. Experts assert that one pimp can make between $5,000 and $32,833.

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21 Whenev ever 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/.
24 POLARIS, supra note 17.
per week tax free. A wide range of experts agree that the average age of entry of a child into domestic CSEC is 12–14 years old.

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.

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. 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.” Yet, those events received scathing scrutiny from providers of legal assistance to CSEC.


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. 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. While computer technology, social media,
Internet websites like Craigslist.com and Backpage.com, and myr-
iad 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. Both law enforcement agents and survivor ser-
vice programs have also become more aware of the increasing role
of women and other youth in the perpetuation of CSEC. Yet, many
youth have deep allegiance, romantic involvement, and family
bonds with their exploiters, and the complexity of CSEC cannot be
underestimated.

31 JULIE HAM, WHAT’S THE COST OF A RUMOUR? A GUIDE TO SORTING OUT
(Global Alliance Against Traffic in Women 2011), http://www.gaatw.org/publica-
tions/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.ny-
times.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 Traf-
ficking, N.Y. TIMES (Feb. 4, 2014), http://www.nytimes.com/2014/02/06/opin-
io/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.ny-
times.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-traf-
ficking.html.

33 Mary Graw Leary, Fighting Fire With Fire: Technology in Child Sex Traf-
ficking, 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 Get-
ing Worse, The GUARDIAN (Apr. 22, 2013, 2:00 PM), https://www.theguardi-
ian.com/lifeandstyle/2013/apr/22/women-sex-trafficking-women-problem.

35 Id. (emerging evidence indicates that increasing numbers of female traf-
fickers 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.”).


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. Some scholars even use battlefield analogies to argue for more stringent terms of incarceration for offenders, casting exploiters and buyers as pure public enemies. At times, scholars mention organized crime and public corruption as overlooked elements of CSEC; 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.

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. 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.”

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


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.”

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. Some scholars hold out the Nordic model of increased criminalization of demand and decriminalization of all sex work as the key solution. 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. However, longstanding criminal justice research suggests that further enhancing criminal sanctions will provide relatively little additional deterrence. On the contrary,

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,
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).
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


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.\textsuperscript{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.\textsuperscript{66} Too many human trafficking laws still focus on the prosecution of minors for prostitution, despite federal and international guidance to the contrary.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{71} Currently, at least twenty-eight states have enacted some version of safe harbor laws.\textsuperscript{72} There is also extensive research on the trauma that law enforcement investigations and criminal trials cause to

\textsuperscript{65} See George, supra note 54, at 332–33.

\textsuperscript{66} See generally Birkhead, supra note 12.

\textsuperscript{67} See Dempsey, supra note 6, at 211; CLAYTON, supra note 12, at 8; Birkhead, supra note 12, at 1061–62; FARRELL, supra note 12, at 190.

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

\textsuperscript{69} Id.

\textsuperscript{70} Id.


\textsuperscript{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.\footnote{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).} CSEC survivors face significant threats, both personally and to their loved ones, when they participate in the prosecution of their exploiters.\footnote{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).} The juvenile and criminal justice system are also particularly ineffective in reforming youth behavior and are highly criminogenic.\footnote{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).} 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.\footnote{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).} 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,
thrill seeking, lack of future orientation, substance use, and susceptibility to peer pressure, regardless of their race or socio-economic status. 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. Instead, adolescents require a particular and often fluid balance of guidance, support, opportunity, and empowerment.

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. Some longitudinal studies reveal recidivism rates as high as 85% for youth involved in the juvenile justice system.
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.’”

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. 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. 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. 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

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

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

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

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. One Oregon child trafficking report explains that for every one survivor accepted for services, another one is denied services due to insufficient funding. 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.” 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.

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. Law enforcement and carceral personnel are still

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.\footnote{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.\footnote{93} However, both the supply and the demand side of CSEC have deep roots.\footnote{94} On the supply side, children’s disadvantages, cultural pressures, and exploiters’ shrewdness lead to a ready supply of children for commercial sexual exploitation.\footnote{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.\footnote{96} This section addresses the socio-cultural and socio-


\footnote{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.


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


\footnote{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.  

CSEC survivors are overwhelmingly survivors of intrafamilial violence and dysfunction, including incest, physical and sexual abuse, neglect, emotional maltreatment, and intimate partner violence. Youth in CSEC tend to have significant health and mental health needs, including substance use issues. At least a considerable portion of exploited children are also gender non-conforming or lesbian, gay, bisexual or transgender. Exploiters and solicitors of children for sex target neighborhoods in turmoil that feature overt interpersonal violence and substance abuse. 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. In short, the cycles of disadvantage and abuse cannot be underestimated.

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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} Many youth involved


\textsuperscript{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).

\textsuperscript{105} Chiamulera, \textit{supra} note 98, at 155.


\textsuperscript{107} \textit{See e.g.}, KATE WALKER, \textit{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., \textit{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.\textsuperscript{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.\textsuperscript{109} Many consider themselves to be in a consensual, romantic relationship with their pimp or exploiter.\textsuperscript{110} For this reason, social service experts argue that “a multisystem coordinated approach” and “a child-centered approach” are needed to fight trafficking successfully.\textsuperscript{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.\textsuperscript{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.\textsuperscript{113} Jonathan Todres makes a particularly compelling argument that a public health perspective towards CSEC should

\textsuperscript{108} Dank, et al., supra note 107, at 4.

\textsuperscript{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.


\textsuperscript{111} See Walker, supra note 107, at 54; Taking Prevention Seriously, supra note 93, at 35-37.

\textsuperscript{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.

\textsuperscript{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. Todres explains that public health success occurs “when a population has been fully immunized so that illness is prevented.” 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. Yet, criminal law interventions and limited survivor services remain primarily reactive. 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. Such successful public health campaigns include those regarding youth smoking, nutrition, seat belt use, and violence. 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.”

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. Yet, branding CSEC survivors as status offenders who receive both protective services and potential punishment keeps skeptical youth


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. 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. 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. Mistrust of law enforcement, the criminal justice system, social services agencies, and people in general, is common among sexually exploited youth. 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. Contrastingly, a study by Marcus, et al., claims to be “the largest dataset ever collected in situ in

122 Id. at 1379–81.
124 See, e.g., DANK, ET AL., supra note 107, at 1–5; Camacho, supra note 76, at 37–59.
the United States on minors working in the sex trade,” and claims that other researchers are too quick to cast “captivity narratives.” 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.

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. This socio-cultural and socio-economic analysis adds a crucial dimension to the discourse, and further clarifies

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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 ‘Pimp 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

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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.
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,” 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, others support the decriminalization of sex work and elevate the role of choice in the matter, stating that “sex workers’ rights are human rights.” 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.

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.\(^\text{137}\) Catherine MacKinnon, Andrea...

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. They assert that any choice of sex work is inherently one compromised—a desperate grab toward lost dignity—that “harms women, both individually and by virtue of its tendency to sustain and perpetuate patriarchal structural inequality.”

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.” According to individualists, women can freely choose prostitution and other sex work, even when they are commercially managed by pimps or other third parties. These individualist feminists distinguish between consensual sex work and non-consensual, coerced sex trafficking, refusing to conflate “trafficking” with “prostitution.” While individualists do not monolithically agree

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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.
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 eroticization 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.\footnote{See e.g., Ahmed, supra note 137, at 232–33.} 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.\footnote{See Halley et al., supra note 137, at 351; see also Chuang, supra note 137, at 381.}

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.”\footnote{Cheryl Nelson Butler, A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America, 27 Yale J.L. & Feminism 95, 120 (2015).} Karen Bravo asserts that successful eradication efforts regarding global trafficking must target “structural” sources of oppression.\footnote{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).} 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.\footnote{Id. at 568.} 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.\footnote{Id. at 583.} Instead, Bravo finds a multi-faceted, structural response to sources of vulnerability and the economic roles of human trafficking to be necessary.\footnote{Id.}

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

\footnotesize{\bibliography{references}
when considering a wide range of socio-political issues, including gender violence, family law interventions, criminality and criminal law, and economic reforms.\textsuperscript{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.\textsuperscript{152} Priscilla Ocen and Cheryl Butler describe how racism and xenophobia have stereotyped and stigmatized black female, and male, sexuality in colonial societies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{156} Both likewise assert that a states’ failure to consider all paid sex by children to be inherently coercive denies the


\textsuperscript{153} See Butler, supra note 145, at 101–03; Ocen, supra note 123, 1588–95.

\textsuperscript{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/cshi0810.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.”).


\textsuperscript{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.\textsuperscript{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 Elizabet 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 punishing allegedly depraved perpetrators.\textsuperscript{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 . . . .”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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, legitimation of nonsexual types of exploitation, and the

\textsuperscript{157} Ocen, supra note 123, at 1637; Butler, supra note 146, at 132.

\textsuperscript{158} Chuang, supra note 91, at 1703; Elizabeth Bernstein, \textit{The Sexual Politics of the “New Abolitionism”}, 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 143 (2007); see Roberts, supra note 151, at 1298.


\textsuperscript{160} Ahmed, supra note 137, at 231.

\textsuperscript{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.  

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. 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, Gruber, Bravo, Crenshaw, Roberts, 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.


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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{174} Likewise, certain harms may statistically cluster among certain groups.\textsuperscript{175} Finding that interdependence un-

\begin{footnotesize}
\begin{enumerate}
\item \textit{The Vulnerable Subject, supra} note 170, at 262–63.
\item \textit{Id.} at 268–69.
\item \textit{Anchoring Equality, supra} note 170, at 4.
\item \textit{The Vulnerable Subject, supra} note 170, at 272–74.
\item \textit{Id.} at 268.
\end{enumerate}
\end{footnotesize}
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. Our legal response to children’s unique status and needs originates in English common law and still retains many elements of that influence. In general, in both sexual and nonssexual contexts, our legal system allows for a continuum of

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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. 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. 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. All states maintain ages of minor consent in their statutory rape laws; although the ages vary between states. 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. 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. 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. There are also strong policy reasons to take their diminished capacity into account. Yet, capacity to make mature decisions typically increases

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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;\textsuperscript{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.\textsuperscript{192}

\textbf{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.\textsuperscript{193} Early American legal treatment of children fell under the long-standing European doctrine of \textit{parens patriae}, with remnants of The Elizabethan Poor Law of 1601.\textsuperscript{194} Under \textit{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.\textsuperscript{195} For centuries, English common law had acknowledged the concept of diminished capacity—that children:

\begin{quote}
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
\end{quote}

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    \item[\textsuperscript{191}] See Drobac, \textit{supra} note 181, at 11–19.
    \item[\textsuperscript{192}] See, \textit{e.g.}, Godsoe, \textit{supra} note 47, at 1323–42.
    \item[\textsuperscript{194}] Grossberg, \textit{supra} note 193, at 6–7.
    \item[\textsuperscript{195}] \textit{Id.}
\end{itemize}
\end{footnotesize}
stripped underage persons of the power to make consequential decisions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{198} The American Revolution ushered in Romanticism and new beliefs about the special innocence and needs of children as a class of dependents.\textsuperscript{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.\textsuperscript{200}

During the 19\textsuperscript{th} century, more overtly racist, sexist, and classist conceptions of child welfare emerged, with a particular concern for the moral welfare of girls.\textsuperscript{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 \textit{parens patriae}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{204} The growth of a capitalist infrastructure via entrepreneurship and independent labor, the creation of

\begin{footnotesize}
\begin{enumerate}
\item[197] See Grossberg, supra note 193, at 6–7.
\item[198] Id. at 7.
\item[199] Id. at 7–8.
\item[201] See, e.g., Grossberg, supra note 193, at 9–12, 17.
\item[202] Id. at 8.
\item[203] Id. at 8–9.
\item[204] Id. at 9.
\end{enumerate}
\end{footnotesize}
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. 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.

Reformatories and Houses of Refuge often kept youth until age 18 or 21 and largely pathologized families’ alleged deviance in corrupting their own children. Girls, Native American, and African-American children were held separately in the name of preventing them from further temptation towards delinquency or sexual promiscuity. 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. Awareness of the detrimental effects of child labor grew from the 1830s onward, with particularly strong child advocacy in New England. Well into the late 1800s, child welfare and juvenile reform institutions featured harsh discipline and oppressive moral guidance.

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. 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

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205 Id. at 9–11.
206 See id. at 16–18.
207 Id.
208 Grossberg, supra note 193, at 17.
209 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{216} By the 1870s, the American anti-prostitution movement had responded, with inspiration from moral reform campaigns of the 1830s.\textsuperscript{217} Feminists, clergy, and social reformers attacked tolerance for male promiscuity, creating the “social purity” movement.\textsuperscript{218} The purity coalition definitively defeated regulated adult prostitution in the U.S. by the mid-1880s.\textsuperscript{219} In subsequent years, sensational news exposes from Britain incited enthusiasm for addressing the commercial sexual exploitation of children in America, as well.\textsuperscript{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.\textsuperscript{221} These moves rested on the centuries-old concepts of \textit{parens patriae} and the diminished capacity of minors.\textsuperscript{222} Historian Michael Grossberg asserts that rather than contradicting inherited gender discrimination, the U.S. application of \textit{parens patriae} simply

\begin{flushleft}
\textsuperscript{214} Id. at 259, 272.
\textsuperscript{215} Id. at 124–25.
\textsuperscript{216} Id. at 124.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 125.
\textsuperscript{220} Id. at 125–26.
\textsuperscript{221} Id. at 125–132.
\textsuperscript{222} Id.
\end{flushleft}
reinforced “judicial patriarchy,” where the state supervised and controlled the fates of women and children.\textsuperscript{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.\textsuperscript{224} As U.S. criminal statutes were codified, this tradition continued.\textsuperscript{225} Delaware shockingly had an age of consent of 7 years old.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{229} Ironically, in post-Reconstruction America, sexual stereotyping, sexual violence, and commercial sexual exploitation involv-

\textsuperscript{224} Hirshman & Larson, supra note 196, at 126.
\textsuperscript{225} Id. at 126-28.
\textsuperscript{226} Id. at 126.
\textsuperscript{227} Id.
\textsuperscript{228} Id. at 126–27.
\textsuperscript{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. 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. At times, WCTU activists reminded (male) legislators of their duty to protect women and exercise sexual restraint as an aspect of manhood. By 1900, thirty-two states and territories had passed laws to raise the statutory age. 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. By the turn of the century, only three southern states still retained age 10 as the statutory age. 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.

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. 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

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. African-American, Native American, and immigrant women and children’s sexual autonomy and integrity remained widely unprotected. The prevalence of sexual violence, exploitation, and lynching was common.

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. Although juvenile courts sought to rehabilitate, rather than strictly punish children who were wayward, harsh forms of incarceration persisted. Training schools and reformatories placed impetus on moral guidance of impressionable youth, who were seen as more amenable to redirection than adult offenders. 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. Historian Christine Stansell asserts that reformers ultimately made the “language of virtue and vice into a code of class.” Shifting demographics in the early 20th century sparked

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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.\footnote{Id. at 162} 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.\footnote{Id. at 162–63.}

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.\footnote{Id. at 162–64.} 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.”\footnote{Id. at 164 (internal citation omitted).} 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.\footnote{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).} 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.\footnote{Id. at 331–32.} The same study nevertheless asserted that African-Americans were more prone to sex crimes.\footnote{Id. at 331–35.} 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.\footnote{Cheryl Nelson Butler, The Racial Roots of Human Trafficking, 62 UCLA L. REV. 1464, 1472 (2015).} 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.\footnote{See, e.g., id. at 1472.} 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
prostitution, other crime, and social corruption.\textsuperscript{255} Black and ethnic civic organizations gained the strength and resources to address these matters throughout the 20\textsuperscript{th} century; yet the remnants of the double-standard endure today.\textsuperscript{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 20\textsuperscript{th} Century sought to temper the State’s \textit{pares 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.\textsuperscript{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 20\textsuperscript{th} and 21\textsuperscript{st} Century.\textsuperscript{258} Further, the \textit{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.\textsuperscript{259} At the same time, our jurisprudence and statutes reinforce children’s unique impressionability, immaturity, diminished culpability, and need for nurturance and guidance.\textsuperscript{260} Currently, the U.S.

\begin{itemize}
  \item \textsuperscript{255} See HIRSHMAN & LARSON, supra note 196, at 64-65, 287; Butler, supra note 253, at 1496–97.
  \item \textsuperscript{256} Butler, supra note 253, at 1495–97.
  \item \textsuperscript{259} See Lawrence Schlam & Joseph P. Wood, \textit{Informed Consent to the Medical Treatment of Minors: Law and Practice}, 10 HEALTH MATRIX 141, 151 (2000); see also ALEXANDER M. CAPRON & IRWIN M. BIRNBAUM, 3-19 \textit{TREATISE ON HEALTH CARE LAW} § 19.04 (Hooper Lundy & Bookman eds., 2016).
  \item \textsuperscript{260} See, e.g., Roper v. Simmons, 543 U.S. 551, 568–70 (2005).
\end{itemize}
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


\(^{262}\) 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


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.\footnote{Roper v. Simmons, 543 U.S. 551, 574 (2005).}

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 \textit{Roper}—by pointing to adolescence as a unique stage of human development.\footnote{See generally \textit{id.} at 569–75.} 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."\footnote{Peter Ash, \textit{But He Knew It Was Wrong: Evaluating Adolescent Culpability}, 40 J. Am. Acad. Psychiatry L. 21, 21 (2012).} Adolescence describes the teenage years between 13 and 19, when people transition from childhood to adulthood.\footnote{PSYCHOL. TODAY, \textit{Adolescence}, https://www.psychologytoday.com/basics/adolescence (last visited Fed. 7, 2016).} However, physical and psychological changes during adolescence can start earlier, “during the preteen or “tween” years (ages 9 through 12).”\footnote{Id.} The transitional period of adolescence features increased struggles with “independence and self-identity,” peer pressure, sexuality, social location,\footnote{Id.} thrill-seeking, and “susceptibility to immature and irresponsible behavior,” accompanied by a "comparative lack of control over their immediate surroundings” (as compared with adults).\footnote{Roper, 543 U.S. at 553.} 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.\footnote{Smith, \textit{supra} note 75, at 145 (citing MACARTHUR FOUND., \textit{supra} note 77, at 2–3); \textit{see also} MACARTHUR FOUND., \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).


\textsuperscript{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).

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.” 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.” 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. 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. 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.” 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{288} In many cases, adults who have sex with children within a two-year age differential are not prosecuted.\textsuperscript{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.\textsuperscript{290} Yet, sex among minors and prostitution by minors remain widely criminalized.\textsuperscript{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-liable for prostitution when they are below the age of consent, precisely

\begin{flushleft}
\textsuperscript{286} Id. at 274–75. \\
\textsuperscript{287} See, e.g., MONICA L. MCCOY & STEFANIE M. KEEN, CHILD ABUSE AND NEGLECT 149 (2d ed. 2014). \\
\textsuperscript{288} See e.g., Birchhead, supra note 12, at 1097–1100; see also FIND THE DATA, Compare Age of Consent & Statutory Rape Laws by State, http://age-of-consent. findtheddata.com (last visited Sept. 20, 2016). \\
\textsuperscript{290} See id. \\
\textsuperscript{291} See, e.g., Birchkhead, supra note 12, at 12, at 1097–1100.
\end{flushleft}
because minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity. The court in In re B.W. relied on U.S. Supreme Court precedent in Roper and Graham.

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. 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. 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. The question

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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).
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. Sex workers experience stigma from both squares and multiple public systems. 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

\[\text{\footnotesize 297} \quad \text{VERY YOUNG GIRLS, supra note 47, at 15:55-16:15/01:09:29.}\]

\[\text{\footnotesize 298} \quad \text{See, e.g., id. at 25:15-28/01:09:29.}\]
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

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.”).
in child welfare, education, and justice systems. 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. 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. The justice system remains largely ill-equipped to deal with these youths’ trauma and even further exacerbates that trauma. Extensive research has also established the failures and dangers of foster care, which include sexual and psychological abuse. 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.


See Kotrla, supra note 129, at 184.


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


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/; Birckhead, 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, 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. Cognitive and behavioral training methods that help CSEC survivors improve their social skills, problem solve, and build relationships are vital. 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. A TIC may be crucial in “combating difficulties in engaging and retaining victims of CSEC and reintegrating CSEC survivors into mainstream society.”

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. 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.).

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.
[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.\footnote{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).}

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.\footnote{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/.} Best practices in Positive Youth Development, general harm reduction, HIV/AIDS prevention and treatment, and youth behavior-change confirm these concepts.\footnote{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.} The major contribution of youth in myriad social justice struggles in the U.S. has been generally overlooked and undervalued. Barbara Woodhouse asserts that:
D. The Missing Link: Youth Agency in Addressing the Needs of CSEC Survivors

Youth agency’s crucial missing link in the approach to CSEC 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. 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.

323 See, e.g., Godsoe, supra note 47, at 1379–83.
324 Id.
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. Many note that transitional living programs, followed by supervised independent living programs, are ideal. Still, existing programs of this kind remain extremely rare. 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. Service providers have confronted challenges in helping this population maintain ties with positive friends, relatives, and associates, while protecting their physical safety. 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

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326 See Bounds et al., supra note 304, at 22; DANK, ET AL., supra note 107, at 110; Birckhead, supra note 12, at 1109–10.
327 See, e.g., Birckhead, 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 Birckhead, 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).
independent living assistance. Although the TVPRA reauthorized the 2005 provisions to support shelters for U.S. CSEC survivors, those provisions were never funded. States persistently suffer from a lack of funding for housing and reintegration services for CSEC survivors. 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.


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

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. 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. 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. The limited programs that offer such services, housing, and training have effectively reduced or prevented recidivism.

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. Although far from a quick fix, civil law remedies begin to put youth in control, while not leaving them unsupported. 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.


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.  

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.  

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. 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.

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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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{347}

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

\begin{footnotes}
\item[345] See Cavalieri, supra note 1, at 1457.
\item[346] See supra notes 330–335.
\item[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).
\end{footnotes}
least 35 U.S. states, in Washington, D.C., they remain a vastly under-utilized tool, according to expert trafficking advocates and a growing number of scholarly voices. As of 2015, “trafficking victims have filed just over 140 cases in federal court.” Of those cases, eleven or fewer involved sex trafficking.

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. A civil remedy provision in the Violence Against

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351 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; HIRSCHMAN & 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{355} Hirshman & Larson, supra note 196, at 302; see Bravo, supra note 147, at 583; Bravo, supra note 4, at 557–58;

\textsuperscript{356} Vandenberg, supra note 348, at 20.

\textsuperscript{357} 18 U.S.C. § 1595(a) (2012).

\textsuperscript{358} Id.

\textsuperscript{359} Id.; Vandenberg, supra note 348, at 24.

\textsuperscript{360} Vandenberg, supra note 348, at 21.
and rehabilitation,” and fund essential survivor housing and reintegration.\textsuperscript{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.”\textsuperscript{362} They recommend a variety of civil tort claims, quasi-contract claims, and state statutory claims.\textsuperscript{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.\textsuperscript{364} There are various models for such civil suits, including class actions by groups of CSEC survivors and individual suits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{367} Youth have previously worked with guardians \textit{ad litem} to build their cases.\textsuperscript{368} Lengthy civil litigation can be traumatic and raises privacy and

\textsuperscript{361} Smith & Vardaman, supra note 342, at 276, 279, 294; see, e.g., Simmons, supra note 349, at 538–59; Anna Williams Shavers, \textit{Human Trafficking, the Rule of Law, and Corporate Social Responsibility}, 9 S.C. J.

\textsuperscript{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 \textit{Francisco v. Susano}, 525 Fed. Appx. 828, 835 (10th Cir. 2013); \textit{Ditullio v. Boehm}, 662 F.3d 1091, 1098 (9th Cir. 2011).”).

\textsuperscript{363} Id. at 146–54.

\textsuperscript{364} Smith & Vardaman, supra note 342, at 294; Dysart, supra note 39, at 676.

\textsuperscript{365} See Vandenberg, supra 344, at 26.

\textsuperscript{366} Id. at 21.

\textsuperscript{367} WERNER ET AL., supra note 342, at 9.

safety concerns as survivors face their exploiters.\footnote{WERNER ET AL., supra note 342, at 7.} 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.\footnote{Id.} A civil case may need to be stayed during a pending federal criminal case, and the possibility of counter-claims abounds.\footnote{Id.} 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.\footnote{M.A. ex rel. P.K. v. Village Voice Media Holdings, 809 F. Supp.2d 1041, 1058 (E.D. Mo. 2011).} 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.\footnote{Kara, supra note 349, at 143 n. 154 (using the United Kingdom as a case study).}

Although potentially less potent as a method of survivor empowerment, criminal restitution is mandatory in trafficking cases under TVPA 18 USC § 1593.\footnote{18 U.S.C. § 1593(b) (2012).} 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.\footnote{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).} 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.\footnote{See 18 U.S.C. § 1593 (2012); Vandenberg, supra note 348, at 8.} Damages are both future-looking and backwards-looking.\footnote{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).} Further, in U.S. v. Cortes-Castro, the 11th Circuit confirmed that defendants cannot argue that CSEC falls under “illegal
activities” and thus not applicable to restitution orders. Yet, prosecutors often apply the incorrect statute in trafficking cases and unwittingly prevent restitution. 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. CSEC survivors would need significant adult assistance in identifying assets and calculating restitution owed. Expert practitioners also advise survivor attorneys to monitor collection by federal authorities.

Restitution also remains a highly under-utilized tool in CSEC cases. 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. 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. 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. A defendant’s ability to pay is irrelevant under § 1593, as opposed to another criminal restitution statute.

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

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379 See Vandenberg, supra note 34, at 14-15.
380 Werner et al., supra note 342, at 8.
381 Id.
382 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{394} The assessments will be collected through existing avenues for collecting criminal fines and will go into a deficit-neutral Domestic Trafficking Victims’ Fund.\textsuperscript{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

\textsuperscript{389} \textit{Id.}


\textsuperscript{392} \textit{Id.}

\textsuperscript{393} \textit{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, \S 3E1.1 at 204 (Nov. 2012)).

\textsuperscript{394} \textit{Id.} at 2.

\textsuperscript{395} \textit{Id.}
services,” through the “[v]ictim-centered Child Human Trafficking Deterrence Block Grant Program.” 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. 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.” 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.” The statute also requires the Department of Justice and federal judicial trainings to include instruction on seeking and ordering restitution in trafficking cases.

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. 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. Title III, the HERO Act, authorizes the Immigration and Customs Enforcement (ICE) Cyber Crimes

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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.
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.\footnote{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,\footnote{405} this federal statute singles out military veterans as being particularly qualified for law enforcement work on CSEC cases.\footnote{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;\footnote{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).\footnote{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 complacence 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,

\footnote{404} Id.
\footnote{406} Human Exploitation Rescue Operations Act § 302 at 255.
\footnote{408} § 115, 129 Stat. at 243.
and to also fund street outreach;\textsuperscript{409} while Section 224 clarifies that an existing TVPA grant can be used to provide housing services to survivors.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 14\textsuperscript{th} Amendment due process claims against state agencies for their failure to protect them during foster care.\textsuperscript{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.\textsuperscript{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

\textsuperscript{409} See SHARED HOPE INT’L, supra note 393, at 8.
\textsuperscript{410} Id. at 9.
\textsuperscript{411} Id.
\textsuperscript{413} Dale Margolin Cecka, The Civil Rights of Sexually Exploited Youth in Foster Care, 117 W. VA. L. REV. 1225, 1253-56 (2015).
\textsuperscript{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 lucrativ- 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.