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Punishment as Protection

Cynthia Godsoe

Brooklyn Law School, cynthia.godsoe@brooklaw.edu

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ARTICLE

PUNISHMENT AS PROTECTION

*Cynthia Godsoe**

ABSTRACT

Each year, thousands of girls are prosecuted, and often incarcerated, for prostitution. Indeed, prostitution is the only crime for which girls are the majority of juveniles arrested. Why are girls below the age of consent victims of statutory rape when they have sex, yet become offenders if they are paid? This differential treatment cannot be justified on retributive or consequential grounds, as prostituted girls inflict only self-harm, usually deemed illegitimate grounds for criminal sanctions, and punishment does not deter their conduct. Criminal sanctions are not only unjustified, but counter-productive. They result in great harms to the individual girls and have not decreased the scope of juvenile prostitution. In short, the cure is worse than the ill.

This Article examines the persistence of this criminalization model and argues that the protectionist rationale offered is pretextual, cover for moralism. Entering ‘the life’ at an average age of thirteen, most of these girls have experienced abuse or family trauma. They are also victims under trafficking and

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statutory rape laws. Nonetheless, studies report that police see only one in five as a victim. The men who purchase girls for sex are rarely prosecuted. Using a historical lens, this Article argues that this punitive paternalism is the current incarnation of a long trajectory of regulating adolescent female sexuality via criminalization.

This story of regulation as punishment also offers broader insights into the dynamics and dysfunctions of the criminal law. The high costs of punishment render criminal sanctions an untenable instrument for addressing self-harm or enforcing sexual norms. By punishing the victims and failing to pursue the real offenders, this institutional approach ignores, even normalizes, the commercial sexual exploitation of children. This Article concludes by considering three alternative frameworks for addressing this widespread social problem.

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I. INTRODUCTION

Jane, aged fourteen, and John, aged thirty, have sex. In every jurisdiction, Jane would be a victim, and John an offender, under statutory rape laws. But if John pays Jane \$50, then she can be prosecuted for prostitution. What transforms Jane from a victim into an offender?

Take another example. Jane, who is from the Bronx, is arrested for prostitution. Julia, also fourteen years old, is from Bosnia. When police discover that she had sex with John for \$50, Julia is deemed a trafficking victim. Rather than being arrested and prosecuted like Jane, Julia is put in safe housing, and given services and possibly immigration relief.

The criminal law has long treated girls' sexual activity in a contradictory manner.¹ On the one hand, sexual abuse and child pornography are viewed as among the most heinous crimes. A panoply of laws punishes, often severely, sexual activity with children.² Statutory rape laws were the earliest attempt to criminalize sex with children.³ These laws take as a central premise that minors below a certain age are incapable of consent. Trafficking laws reauthorized in the last decade

1. Although there are some significant differences in the juvenile and adult systems, both bring harms including possible incarceration, and juvenile adjudications are often used for sentencing enhancements or predicate acts for increased punishment of adult criminal activity. *See, e.g.,* United States v. Olfano, 503 F.3d 240, 242–44 (3d Cir. 2007); BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 858–62 (2000). By incarceration, I mean secure confinement in either the juvenile or criminal system.

2. *See, e.g.,* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 856–59 (2011).

3. *See infra* notes 57–65 and accompanying text.

also seek to prevent the sexual exploitation of minors, particularly girls.⁴

On the other hand, the law on the books and in practice in virtually every state allows, even mandates, the arrest, prosecution, and incarceration of girls who are prostituted.⁵ This is not a small or hypothetical problem. The federal government estimates that at least 100,000 minors are prostituted each year in the United States, and researchers put the number of children at risk for prostitution as high as 300,000.⁶ A variety of sources further demonstrate that minors, mostly girls, are routinely arrested and prosecuted for prostitution.⁷ For instance, 3,825 minors were arrested for prostitution in New York City alone between 1998 and 2006.⁸ Many of them are very young—girls enter “the life” on average between the ages of eleven and fourteen.⁹ Most have experienced abuse or family trauma before

4. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7200 (2012) (reauthorized 2013).

5. I grappled at some length with what terminology to use in describing these girls. I use the term “prostituted children,” as most statutes describe the offense of exchanging sex for money as “prostitution” and this terminology is still overwhelmingly used by police and courts. The more appropriate term is “commercially sexually exploited children.” The U.S. Department of Justice (DOJ) recently endorsed this as the correct term to use in referring to these minors. William Adams, Colleen Owens & Kevonne Small, *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, JUV. JUST. BULL., July 2010, at 8, available at <http://ncjrs.gov/pdffiles1/ojjdp/228631.pdf>.

6. RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 4 (2002); Matt Korade, *DHS Adviser: Government Needs Public's Help in Fighting Human Trafficking*, CQ HOMELAND SECURITY, Oct. 18, 2010, available at 2010 WLNR 21249805.

7. The most comprehensive report to date on this issue supports this conclusion. See INST. OF MED. & NAT'L RESEARCH COUNCIL, *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES* 2 (Ellen Wright Clayton, Richard D. Krugman & Patti Simon eds., 2013) [hereinafter NRC] (“Most states continue to arrest commercially exploited children and adolescents as criminals instead of treating them as victims . . .”). The DOJ also acknowledges that over 1,000 children are arrested for prostitution each year. Stella Dawson, *U.S. Jails Sex-Trafficked Kids in Human Rights Abuse, Group Says*, REUTERS (Mar. 16, 2015, 11:39 PM), <http://www.reuters.com/article/2015/03/17/us-trafficking-us-children-idUSKBN0MD0AJ20150317>. This is almost certainly an underestimate as prostitution arrests and convictions are not comprehensively tracked. Accordingly, researchers have noted that “[m]ost discussions of the prostitution of juveniles rely heavily on anecdotal case studies” due to the lack of data. See David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUST. BULL., June 2004, at 10, available at <http://ncjrs.gov/pdffiles1/ojjdp/203946.pdf>. Accordingly, I draw broadly from published cases, media accounts, a few interviews, and policy reports to gather a fuller picture of this issue.

8. 2 AMY MUSLIM, MELISSA LABRIOLA & MICHAEL REMPEL, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY* 14 (2008).

9. See *Exploiting Americans on American Soil: Domestic Trafficking Exposed: Hearing Before the Comm'n on Sec. & Cooperation in Eur.*, 109th Cong. 6 (2005) (statement of Chris Swecker, Assistant Director, FBI) [hereinafter Swecker Congressional Testimony] (average age of entry is eleven to fourteen, while some are as young as nine).

entering the commercial sex industry.¹⁰ Nonetheless these girls continue to be punished, usually incarcerated, for sexual acts to which they are incapable of legally consenting. This is even true of girls “rescued” in recent FBI operations to combat trafficking.¹¹ Indeed, they are prosecuted at far higher rates than the “johns” and “pimps” who buy and sell them.¹²

What explains this inconsistency? A closer look at the history of the juvenile justice system reveals a focus on regulating girls’ sexuality. The same reformers who advocated for statutory rape laws created the juvenile court and attendant reformatories tasked with “saving” the thousands of working-class and immigrant youth crowding America’s cities.¹³ Obsessed with adolescent female sexuality, the system’s treatment of girls focused almost exclusively on moral offenses, including premarital sex or other signs of sexuality in a girl’s dress or behavior.¹⁴

Girls continue to be punished for nonconforming sexual behavior.¹⁵ Those who end up in the criminal system are those

10. A Los Angeles police officer in charge of a specialized vice unit reports that “ninety-nine percent” of the hundreds of adults in prostitution he has encountered entered as minors, and that “[the life is] all they’ve known.” Mike Kessler, *Gone Girls*, L.A. MAG., Nov. 2014, at 150, 154.

11. See, e.g., Carolyn Davis, *New Efforts Target Young Victims of Trafficking*, PHILLY.COM (Aug. 14, 2013), http://articles.philly.com/2013-08-14/news/41378726_1_abused-children-operation-cross-country-victims (quoting a law enforcement officer who jailed a prostituted teenager after a “rescue” operation: “Can we treat her as a 100 percent victim right now? I can’t say that until an investigation is done.”); Margie Shafer, *17 Arrested in Oakland Police Sting Targeting Prostitution, Human Trafficking*, CBS (Nov. 13, 2014, 12:26 PM), <http://sanfrancisco.cbslocal.com/2014/11/13/17-arrested-in-human-trafficking-sting-executed-by-oakland-police/> (reporting on arrest of people engaged in prostitution, including at least one juvenile, during a human trafficking sting).

12. See *infra* Figures 2 and 3.

13. Indeed, the two crimes were connected from the beginning as “[statutory rape] legislation rested upon the belief that men initiated unwitting young women into sexual activity that led to prostitution.” JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 153 (3d ed. 2012).

14. See *infra* Part IV.A.2.

15. I adopt a definition of punishment whereby “a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen.” John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955). This definition is arguably broader than necessary as I am describing actions that are indisputably punitive, such as delinquency adjudications and criminal convictions, and incarceration in a locked juvenile or adult facility. A broad definition captures state regulation, which on its face may not be criminal or punitive. In determining whether a measure is punitive, courts should ascertain “whether an alternative purpose to which it may rationally be connected is assignable for it.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). Punishment thus could include other actions such as police detainment of prostituted girls to seek mandated counseling, material witness holds in jail, excessive surveillance by police and other state actors, and arrests even when they do not result in prosecution. See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (arrests).

who violate feminine and victim roles and related norms of chastity and obedience.¹⁶ This truth is particularly apparent in the case of prostituted minors. Prostituted girls continue to be viewed primarily as offenders—recent studies show that police see only one in five prostituted minors as victims, with 74 percent of youth in reported instances of juvenile prostitution arrested as offenders.¹⁷ The deputy mayor of Washington, D.C., for instance, recently opposed legislation that would stop sanctions of prostituted juveniles, describing some of them as “legitimate offenders,” who “prostitute through their own volition” because they have “decided that payment for sexual favors is the best way to gain monetary security.”¹⁸ This focus on the girls’ conduct, girls sometimes so young that they carry teddy bears, suck their thumbs, or are paid in McDonald’s Happy Meals, renders all prostituted children offenders.¹⁹ Tellingly, although many are victims of statutory rape, they are not viewed as such, nor are the adult men who have sex with them prosecuted as rapists.²⁰

16. See RUTH M. ALEXANDER, *THE “GIRL PROBLEM”: FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930*, at 150 (1995) (describing New York’s criminal justice system as treating female sexual promiscuity as a variant of prostitution); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1096–97 (2014). Historically, girls were punished explicitly for nonconformity; now this occurs under the guise of protection. This illustrates what Reva Siegel has termed “preservation-through-transformation.” See Reva B. Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2184 (1996).

17. See Stephanie Halter, *Factors That Influence Police Conceptualizations of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents*, 15 CHILD MALTREATMENT 152, 153 (2010); Finkelhor & Ormrod, *supra* note 7, at 5; see also Kimberly J. Mitchell, David Finkelhor & Janis Wolak, *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, 15 CHILD MALTREATMENT 18, 30 (2010) (reporting that prostituted children are more often viewed as delinquents rather than victims if the “case comes to police attention due to police initiative alone”). The victim and offender categories are more than just labels. Rather, these antipodal categories determine whether a girl receives punishment or assistance.

18. Alyssa Peterson, *The Criminalization of Children Forced into Prostitution*, THINK PROGRESS (Aug. 27, 2014, 2:56 PM), <http://thinkprogress.org/health/2014/08/27/3476113/dc-child-survivors-sex-trafficking/> (quoting D.C. Deputy Mayor for Public Safety and Justice Paul A. Quander, Jr.). Political leaders have opposed similar legislation in other states and jurisdictions. See, e.g., John Feinblatt, *NY’s Pro-Pimp Bill*, N.Y. POST (June 21, 2008, 8:27 AM), <http://nypost.com/2008/06/21/nys-pro-pimp-bill/> (opposing legislation that decriminalized prostitution for children under fifteen).

19. VERY YOUNG GIRLS (Showtime Network 2007).

20. Extensive research revealed only a handful of published statutory rape cases, wherein the victim was a prostituted girl. None of those cases resulted in conviction for any serious offense. Advocates also report that they have never heard of such a prosecution. See, e.g., RACHEL LLOYD, *GIRLS LIKE US* 18–19 (2011); Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 18–19 (2011). Most customers of

The criminal treatment of prostituted girls remains significantly understudied. Scholars have described the rise of the criminal justice system as a tool to regulate and segregate marginalized populations.²¹ Historians have outlined the coercive nature and purpose of the early juvenile court, and its particular focus on girls' morality and sexuality.²² Still largely overlooked, however, is the criminal law's ongoing regulation of girls' sexuality in the context of prostitution.²³ More broadly, paternalistic punishment is undertheorized. Prosecutions of prostituted girls are often termed protective acts, done for girls' own good to protect them from pimps, a "bad reputation," and other real or perceived dangers.²⁴ This Article takes up the task of explaining this inconsistent treatment of sexually active girls. It also takes a skeptical look at the protectionist rationale, digging beneath the rhetoric to uncover larger patterns of social control.²⁵

In telling this story of regulation by punishment, this Article makes several descriptive and normative claims. First, traditional theories of punishment fail to explain the prosecution of this high-needs, low-risk population.²⁶ This is true both of retributivist theories, which defend punishment on "just desert" grounds, and consequentialist theories, which justify punishment to prevent future crime. Prostituted girls' legal status as victims under statutory rape and trafficking laws, and their actual victimization by family members, pimps, and customers, make them particularly undeserving of punishment.²⁷ Research reveals that girls want to leave prostitution but are not offered the

prostituted minors are not arrested or prosecuted at all. Those that are face the minor offense of solicitation, which almost never leads to incarceration. See *infra* notes 142–49 and accompanying text.

21. See *infra* Part IV.A.1.

22. See *infra* Part IV.A.2.

23. See *infra* Part III.A.2; *infra* notes 135–41 and accompanying text. Several exceptions include Annitto, *supra* note 20; Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055 (2011).

24. See *infra* notes 228–30 and accompanying text.

25. Other scholars have engaged in similar interpretive work. One excellent recent example is MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (arguing that the criminal justice system, mass incarceration and collateral consequences operate to control and suppress African-Americans).

26. My analysis and arguments here are limited to the juvenile context; I do not take a position in the vigorous debate about whether adult prostitution should be legalized. The criminal justice system's treatment of prostitution, however, should arguably take into account the fact that the majority of prostitution offenders enter prostitution as minors.

27. See *infra* notes 320–26 and accompanying text.

resources to do so.²⁸ The harms of prosecution and incarceration leave most of them worse off after involvement with the system, revealing a protectionist rationale to be largely pretextual.²⁹

Second, criminalizing this behavior is not only unjustified, but counter-productive. Prosecution is ineffective both at securing cooperation against pimps and other exploiters, and at reducing girls' recidivism.³⁰ Individual police, prosecutors, and judges increasingly recognize this. For instance, one Atlanta police officer poignantly describes realizing that a nineteen-year-old he had just arrested was the same girl he had arrested six years before.³¹ Indeed, girls' bad experiences with police and other state actors, and the lack of meaningful services or housing, arguably have an anti-deterrent effect. This practice also risks selective enforcement of particularly marginalized youth, as well as the significant legitimacy costs when the criminal law operates in an incoherent and opaque manner.³²

Third, the criminal law continues to be implemented in a highly gendered fashion. I focus here on girls and young women, although many boys, young men, and transgender youth are also victimized by statutory rape and prostitution.³³ I focus on girls because they are the large majority of minors arrested for prostitution, one of only two offenses for which this is so.³⁴ The treatment of prostituted girls also reflects a broad array of

28. See *infra* notes 304–20 and accompanying text (explaining why law enforcement and incarceration are not an effective means to protect victims of sexual exploitation).

29. This theory is further supported by the failure of police and prosecutors to robustly pursue and punish the real offenders—the pimps and customers. See *infra* notes 142–47 and accompanying text.

30. See *infra* Part III.B.1–2.

31. Jane O. Hansen, *Runaway Girls Lured into the Sex Trade Are Being Jailed for Crimes While Their Adult Pimps Go Free*, ATLANTA J. CONST., Jan. 7, 2001, at 1A. The officer concluded that “[t]he system has failed her There is nothing for these girls.” *Id.*

32. See *infra* Part IV.A.1.

33. See Karyl Troup-Leasure & Howard N. Snyder, *Statutory Rape Known to Law Enforcement*, JUV. JUST. BULL., Aug. 2005, at 3, available at <http://www.ncjrs.gov/pdffiles1/ojdp/208803.pdf>. Gender influences the entire landscape of sex work. For instance, transgender girls and women are frequently rounded up as suspected prostitutes whenever they are out in public, leading to the coining of the phrase “walking while trans.” JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 61–62 (2011).

34. In 2009, girls comprised 78 percent of the juveniles arrested for prostitution. Charles Puzzanchera & Benjamin Adams, *Juvenile Arrests 2009*, JUV. OFFENDERS & VICTIMS: NAT'L REP. SERIES BULL., Dec. 2011, at 4, available at <http://ojdp.gov/pubs/236477.pdf>. The other offense, running away, is related. Girls who run away often flee abuse at home, and are at great risk for sexual exploitation on the streets. See *infra* notes 357–60 and accompanying text.

gender differences in the juvenile justice system.³⁵ Girls are more frequently, and more harshly, punished for minor, nonviolent crimes than boys. This is particularly true of offenses related to sexuality or morality, such as prostitution.³⁶ The paternalistic justification offered is also gendered—boys are not incarcerated on the basis that it will “help” them.³⁷ Finally, this examination of juvenile prostitution offers critical insight into the limits of the criminal law.³⁸ The harsh approach to prostituted girls, and the costs of this approach, suggest that protection from self-harm is not an appropriate ground for criminal sanctions. Such “punitive paternalism” too easily elides into moralism, largely discounted as a valid basis for punishment in modern times.³⁹ This discussion also highlights the overuse of the criminal justice system to address social problems.⁴⁰ A perplexing truth is that the more victimized a girl is, the more likely she is to be prosecuted and incarcerated.⁴¹ Under this framework, even the youngest and most vulnerable are held accountable for their own victimization. This institutional approach normalizes child sexual exploitation, or at best ignores it.⁴²

A caveat for clarification is needed. I am not arguing that all, or even most, police, prosecutors, and judges are hostile towards

35. See *infra* Part IV.A.2.

36. See *infra* Part IV.A.2.

37. See, e.g., Barry C. Feld, *Girls in the Juvenile Justice System*, in THE DELINQUENT GIRL 225, 248–52, 254–55 (Margaret A. Zahn ed., 2009) (contrasting the paternalistic rationale often underlying girls’ entry into the juvenile justice system from that underlying boys’ entry).

38. This is not to say, however, that the criminal law has no role in preventing juvenile prostitution; to the contrary, increased enforcement of laws against buyers and pimps of juveniles, as well as greater sanctions for those purchasing minors for sex, is an important step to addressing this problem. Several states have recently strengthened their laws in exactly this fashion. See, e.g., ARIZ. REV. STAT. ANN. § 13-3552 (Supp. 2014); FLA. STAT. ANN. § 796.035 (West Supp. 2015); see also Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 67 (2012) (suggesting “demand-side” approaches to prostitution more generally).

39. Sociologist Loïc Wacquant has used this term to describe the interaction of the criminal and social welfare systems to marginalize and punish low-income people. LOÏC WACQUANT, PUNISHING THE POOR 16–17 (2009). I use the term more narrowly, to describe the use of criminal sanctions against a person, ostensibly for her own benefit.

40. As psychologist Abraham Maslow famously observed: “[I]t is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.” ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15–16 (1966).

41. See *infra* notes 228–30 and accompanying text (describing the desire to protect victimized girls as the most common justification offered for incarceration).

42. As the Alameda County, California, District Attorney explains, seeing girls who sell sex as criminals rather than victims “allows communities to ignore them as invisible.” Lee Romney, *Campaign Cracks Down on Oakland Child-Sex Trafficking*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/local/la-me-ln-oakland-child-sex-trafficking-20140109>.

these victimized girls. Many are trying to help them, and do not know how else to do so, or lack resources such as safe housing for runaways.⁴³ They often face the devastating choice of jailing a vulnerable child or putting her back on the streets to face great risks. So is this story really about punishment or more about misguided efforts to help?

Regardless of the motivations of individual actors, or the “rescue” rhetoric, the systemic approach to juvenile prostitution remains prosecution and, often, incarceration of the girls themselves. Contributing to the persistence of this approach is the rigid victim-offender binary. Police and other criminal justice actors divide the world into good and bad, declining to recognize the more complex reality.⁴⁴ Juvenile prostitution, however, is “messy”; prostituted children rarely act like victims, or even like children.⁴⁵ As a result, many treat these children as only offenders—“apathy and outright disdain” become the primary responses.⁴⁶ Compounding this dynamic is the societal discomfort and disgust for girls who are sexually active, even those who have been exploited. Widely used police terms for cases involving adult prostitutes and prostituted minors, such as “NHI (no humans involved)” or “the trash run,” reflect this view.⁴⁷ The criminal justice system’s ongoing line-drawing between female victims and offenders based on sexuality exposes this discomfort. And this discomfort transforms protection into punishment.

This Article proceeds in four parts. Part II traces the inconsistent treatment of girls for sexual activity below the age of consent. It then outlines the significant costs of this paradox. Part III considers potential justifications for prosecuting girls for prostitution, concluding that none of the offered rationales pass theoretical or practical muster. Part IV describes the most plausible explanation for this practice, punishment for nonconforming sexual conduct. Bringing to the fore the largely hidden historic use of the criminal law to regulate girls’ sexual behavior, it then interprets the current treatment of prostituted minors as a system of gendered social control. Part V concludes

43. See *supra* notes 30–32 (citing lack of adequate services or housing as one of the reasons prosecution of child victims is ineffective).

44. I critique this binary, and its centrality to the criminal law, in a forthcoming work. See Cynthia Godsoe, *Victims and Offenders* (draft on file with author).

45. Many police officers do not like these cases because of the deep needs of these minors and the noncriminal justice orientation of the nonprofits that work with them. One former prosecutor described overcoming this culture as the biggest challenge in these cases. Telephone Interview with former prosecutor (Jan. 6, 2014).

46. LLOYD, *supra* note 20, at 146; see also *supra* notes 15–17.

47. LLOYD, *supra* note 20, at 147.

by sketching out some alternative policy options for addressing juvenile prostitution.

II. THE PARADOX OF GIRLHOOD SEX

Statutory rape and prostitution laws are in tension, both in theory and practice. An underage girl having sex with an older man is either a victim incapable of consent, or old enough to agree. Her ability to consent is not dependent on money changing hands. Nor, as we shall see, are prostituted girls less vulnerable or coerced than girls in statutory rape cases—if anything, the reverse is true.

After outlining this paradox, this Part describes the immense costs incurred by a system that punishes prostituted girls. This flawed policy likely increases girls' entrenchment "in the life," as well as harms them in additional unanticipated ways. Categorizing all prostituted children as offenders erases their victimhood, rendering the problem of juvenile prostitution invisible to "nice people" and giving their exploiters a free pass. Finally, this unjust treatment of already marginalized girls erodes the legitimacy of the criminal law.

A. *Victim or Offender?*

1. *Victim: Statutory Rape.* Statutory rape laws have long been controversial, yet they remain on the books in every state. In both England and America, these laws originally served to protect "the purity of [young girls]" before marriage.⁴⁸ At various times in the last century, they have aimed to combat the spread of sexually transmitted infections,⁴⁹ collect child support,⁵⁰ help prosecute forcible rape,⁵¹ and protect society against the costs of young motherhood and girls from sexual exploitation by older men.⁵²

Statutory rape continues to have a gendered nature; so much so that in 1981 the Supreme Court found it

48. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 32–33 (1994) (quoting *Pawson v. State*, 865 S.W.2d 36, 41 app. n.4 (Tex. Crim. App. 1993)).

49. See *People v. Gonzales*, 561 N.Y.S.2d 358, 361–62 (Westchester Cnty. Ct. 1990).

50. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 711 n.82 (2006).

51. CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 17 (2004).

52. See, e.g., *State v. LaMere*, 655 P.2d 46, 49–50 (Idaho 1982) (unwanted pregnancy); *Commonwealth v. Albert*, 758 A.2d 1149, 1153 (Pa. 2000) ("The [statutory rape statute] properly . . . [puts] [t]he onus of sexual responsibility . . . on the older more mature individual in the relationship.").

constitutional to punish only males for statutory rape.⁵³ Even though most state statutes now use gender-neutral language, the vast majority of defendants continue to be men, and the victims girls.⁵⁴ Legislatures, courts, and prosecutors continue to be concerned primarily with preserving girls' chastity or protecting girls from exploitation, rather than protecting young girls *and* boys from exploitation.⁵⁵

The current age of consent varies from thirteen to eighteen, but is sixteen years old in over half the states and under federal law.⁵⁶ The nonculpability of the minor is apparent from the doctrinal rule that a minor cannot be an accomplice to her own statutory rape.⁵⁷ Recognizing that the exploitation at the heart of the crime comes mainly from the greater maturity of the offender, most states now take into account the age difference between the victim and offender.⁵⁸ Teenagers who have sex are often exempted from liability, either *de jure* or *de facto*, as these encounters are not considered to contain the same coercive elements as those with an older man and a younger girl.⁵⁹ Even where liability is not dependent upon it, a greater age difference has resulted in prosecutors and courts recommending or imposing a higher charge or a more severe sentence.⁶⁰

53. *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 473 (1981).

54. See Troup-Leasure & Snyder, *supra* note 33, at 1 (95 percent of cases involve female victims and male defendants).

55. See, e.g., *Hernandez v. State*, 754 S.W.2d 321, 326 (Tex. App.—Houston [14th Dist.] 1988) (“The purpose of the . . . statutory rape statute was to prevent imposition upon females under the age of seventeen by older and presumably more experienced males.”), *aff’d*, 861 S.W.2d 908 (Tex. Crim. App. 1993).

56. See ASAPH GLOSSER, KAREN GARDINER & MIKE FISHMAN, *THE LEWIN GRP., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS* 5–8 (2004), available at <http://aspe.hhs.gov/hsp/08/sr/statelaws/report.pdf>; see also 18 U.S.C. § 2243(a)(1) (2012). Significantly, however, the TVPA considers all prostituted people under eighteen to be *per se* victims.

57. See, e.g., *In re Meagan R.*, 49 Cal. Rptr. 2d 325, 330 (Cal. Ct. App. 1996) (holding that a fourteen-year-old girl could not be liable for aiding and abetting in her statutory rape because she “was the protected victim under . . . a provision designed to criminalize the exploitation of children rather than to penalize the children themselves”).

58. See, e.g., N.Y. PENAL LAW §§ 130.25–.35 (McKinney 2014); MISS. CODE ANN. § 97-3-65(1)(a)–(b) (West 2011).

59. At least sixteen states require that a defendant be a minimum age in order to prosecute him or her for statutory rape. GLOSSER, GARDINER & FISHMAN, *supra* note 56, at 6–7; Lisa Pearlstein, Note, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, 47 AM. CRIM. L. REV. 109, 120 (2010).

60. See, e.g., Oberman, *supra* note 48; Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1254–55 (1998).

Statutory rape is not widely prosecuted, yet the penalties for it remain high in many jurisdictions.⁶¹ The focus today is primarily on protecting minors from sex with adults in light of the potential harms from such encounters.⁶² Prosecutors and courts broadly consider the various types of coercion adults use to pressure minors into having sex, including “economics, deceit, violence, or romance.”⁶³ Courts have emphasized that youth precludes girls from consenting, regardless of their individual maturity or the circumstances of the encounter—the age difference alone renders the dynamic coercive. As one court put it: “The law conclusively presumes that those under [the age of consent] are not sufficiently mature to understand fully the physical, mental, and emotional consequences of sexual intercourse, and are therefore incapable of making a rational decision about whether to consent to such conduct.”⁶⁴ This rubric posits a polarized binary between the adult “predator” meriting punishment and the “inevitably vulnerable,” innocent, and “virtually defenseless” minor needing protection.⁶⁵

2. *Offender: Prostitution.* The other story of girls engaged in sexual activity is a punitive one. Across the country, girls are routinely arrested and convicted, or adjudicated a juvenile delinquent, for prostitution, i.e. “engag[ing] in sexual activity as a business” or “for a fee.”⁶⁶ The assumptions outlined above about the vulnerability of minors, and the greater culpability of adults who have sex with them, break down in this context.

Prostitution has historically been a highly contested crime. Nonetheless, as Frank Zimring and Bernard Harcourt point out, it has seen virtually no reform from 1950 until very

61. See AM. PROSECUTORS RESEARCH INST., STATE RAPE STATUTES, *available at* http://www.arte-sana.com/articles/rape_statutes.pdf (last visited Apr. 18, 2015) (comparing rape penalties among states); Troup-Leasure & Snyder, *supra* note 33, at 1–2 (estimating 15,700 reports nationwide in 2000 but noting that its incidence is “relatively unknown”). Only 42 percent of reports resulted in an arrest. *Id.* at 1.

62. See, e.g., *People v. Douglas*, 886 N.E.2d 1232, 1243 (Ill. App. Ct. 2008) (“[T]he State has a legitimate interest in protecting children of tender years from sexual involvement and in putting on the adult the burden of determining the age of the child.”). These potential harms are both physical and emotional. See, e.g., *State v. Ware*, 418 A.2d 1, 4 (R.I. 1980) (noting “the severe physical and psychological consequences of [underage sex]”).

63. Levine, *supra* note 50, at 711 (citing prosecutors).

64. *Commonwealth v. Dunne*, 474 N.E.2d 538, 545 n.17 (Mass. 1985).

65. See *State v. Jadowski*, 680 N.W.2d 810, 817 (Wis. 2004); *Jones v. State*, 640 So. 2d 1084, 1086 (Fla. 1994); *McGuire v. State*, 706 S.W.2d 360, 361–62 (Ark. 1986).

66. MODEL PENAL CODE § 251.2 (1980); TEX. PENAL CODE ANN. § 43.02(1) (West 2013). Every state prohibits or regulates prostitution. 73 C.J.S. *Prostitution and Related Offenses* § 1 (2012).

recently, in stark contrast to other vice crimes and to statutory rape.⁶⁷ As outlined further below, the justifications for criminalizing prostitution include deterring the spread of sexually transmitted diseases, as well as the “public affront” to moral citizens of public solicitation.⁶⁸ Like statutory rape, prostitution continues to be gendered. It was historically defined in gender-specific terms; one illustrative 1951 definition describes it as “the indiscriminate offer by a female of her body for the purpose of sexual intercourse or other lewdness.”⁶⁹ Although all statutory definitions of prostitution are now gender-neutral, the vast majority of people arrested for and convicted of prostitution are girls and women.⁷⁰

The statutory structure governing prostitution does not take into account age; the law on the books in almost all states permits the prosecution for prostitution of minors below the age of consent.⁷¹ Thousands of girls are arrested and prosecuted for prostitution.⁷² Arrests for prostitution constitute one of girls’ major entryways into the criminal system.⁷³ Girls are frequently incarcerated, both pre- and post-adjudication.⁷⁴ As Figure 1 demonstrates, prostituted girls are far more likely to be treated as offenders than as victims.

Indeed, minors prosecuted for prostitution are much more severely sanctioned than adults. A woman arrested for prostitution will be out the system’s “revolving door” in a day or

67. FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE 634 (2007).

68. *Id.* at 47; *see also infra* notes 230, 241 and accompanying text (describing the risks minors face and moral concerns as justifications for punishment).

69. ZIMRING & HARCOURT, *supra* note 67, at 634.

70. *See* NRC, *supra* note 7, at 144 (noting statutory changes to gender-neutral prostitution definitions).

71. In the last few years, some states have passed “Safe Harbor” statutes to treat prostituted minors differently than adults. *See infra* note 386. Even after these laws are enacted, girls continue to be arrested for prostitution. *See infra* notes 387–89 and accompanying text.

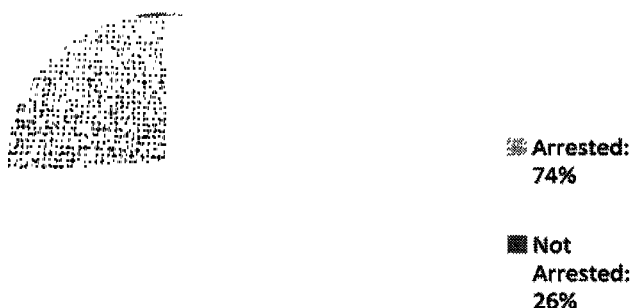
72. *See supra* note 7 (collecting sources); *see also* DARLENE LYNCH & KIRSTEN WIDNER, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 9 (2008), available at http://bartoncenter.net/uploads/fall2011updates/status_other/CSEC-recs-for-policy-makers.pdf; MUSLIM, LABRIOLA & REMPEL, *supra* note 8, at 14, 58 (reporting almost 4,000 arrests over a nine-year period in New York City and that almost 90 percent of these minors pled guilty or were convicted); Abby Sewell, *Foster Youths in Sex Trade*, L.A. TIMES, Nov. 28, 2012, at AA1 (reporting that, in 2010, 174 minors were arrested in Los Angeles for prostitution-related offenses).

73. Godsoe, *supra* note 16, at 1107–09 (describing the entry of juveniles into the system).

74. *See infra* notes 304–11 and accompanying text.

two.⁷⁵ She is likely to be arrested repeatedly, but never to face any significant period of incarceration. Girls, on the other hand, are frequently prosecuted and incarcerated for lengthy periods on prostitution or related charges.⁷⁶ Knowing this reality, most pimps pressure girls to lie about their age to police and others so they are processed as adults and quickly released.⁷⁷

FIGURE 1: PERCENTAGE OF PROSTITUTED MINORS TREATED AS OFFENDERS VERSUS VICTIMS (NATIONAL STUDY)⁷⁸



Like legislatures, courts have been largely silent on this issue, although trial courts routinely process juvenile prostitution cases.⁷⁹ Several appellate courts in the last decade,

75. JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CTR., *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* 72, 78 (2003), available at <http://sexworkersproject.org/downloads/RevolvingDoor.pdf>. As one former defense attorney put it, prostitution by adults has been “de facto” decriminalized as law enforcement and courts do not deem it worthy of significant attention or sanctions. Telephone Interview with former defense attorney (Jan. 15, 2014).

76. See *supra* notes 8–10 and accompanying text (reporting the statistics from the MUSLIM, LABRIOLA & REMPEL study); *infra* notes 79–84 and accompanying text (summarizing cases that imposed harsh penalties on girls).

77. See Francine T. Sherman & Lisa Goldblatt Grace, *The System Response to the Commercial Sexual Exploitation of Girls*, in *JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE* 331, 335 (2011) (suggesting that this practice is very widespread). Police and others are sometimes complicit in this pretense; identifying the girls as minors, particularly as minor victims, raises many problems. See *infra* Part II.B.3.

78. This data is drawn from the only national analysis of juvenile prostitution. See Finkelhor & Ormrod, *supra* note 7, at 8; see also Halter, *supra* note 17, at 153–54, 156 (reporting the same trend).

79. Most such cases are never appealed, and so remain unpublished or even untracked, but there are cases from across the country. See, e.g., *In re J.J.*, No. A125054,

however, have expressly condoned this practice. For instance, a Texas court affirmed a girl delinquent for prostitution, first noting that the state penal code did not limit its definition of prostitution to adults.⁸⁰ Similarly, a New York appellate court affirmed the delinquency adjudication of a twelve-year-old girl for prostitution and incarcerated her for twelve months.⁸¹

Both courts dismissed the inconsistencies between state statutory rape laws and prostitution laws.⁸² The New York court acknowledged that the girl was “incapable of consenting to any sexual act[,]” but found “this circumstance was irrelevant to the issue of whether she was properly found to have committed an act [of] prostitution.”⁸³ The Texas court declined the girl’s argument that other penal code provisions punishing adult exploiters of children signaled a legislative intent to protect children from prosecution, maintaining that the state needed the power to punish some minors for prostitution, or deter them by the threat of punishment.⁸⁴ In both cases, the courts ignored not only the girls’ legal incapacity to consent, but also evidence of family and other trauma, which precipitated their prostitution. Given these deliberate attempts to isolate the prostitution law from statutory rape law, it is perhaps not surprising that there appear to be no prosecutions for statutory rape associated with these or other cases of prostituted minors.

Measuring the scope of juvenile prostitution is very difficult, leading government agencies and experts to call for more

2009 Cal. App. Unpub. LEXIS 9995, at *17–18 (Cal. Ct. App. Dec. 17, 2009) (affirming the adjudication of a minor for prostitution); *In re Nicolette R.*, 779 N.Y.S.2d 487, 488 (App. Div. 2004) (affirming the adjudication of a twelve-year-old girl for prostitution and noting that the statute defining prostitution “contains no age requirement”).

80. *In re B.D.S.D.*, 289 S.W.3d 889, 895–96 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (“[Nowhere in this statutory scheme including statutory rape laws] did the Texas legislature state that a child cannot offer or agree to engage in sexual conduct with an adult. Under the plain meaning of the prostitution statute, a child under [the age of consent] can engage in [prostitution].” (citations omitted) (citing prior cases that endorse prosecution of minors for prostitution)).

81. *In re Nicolette R.*, 779 N.Y.S.2d at 488.

82. *See id.* (“There is nothing in the Penal Law to support the conclusion that [the statutory rape section] was intended to bear any relationship to [the prostitution section.]”); *In re B.D.S.D.*, 289 S.W.3d at 896 (dismissing the child’s argument that the statutes “cannot be harmonized to give each of them effect”).

83. *In re Nicolette R.*, 779 N.Y.S.2d at 488. The New York legislature recently passed the Safe Harbour for Exploited Children Act. Fernando Camacho, *Sexually Exploited Youth: A View from the Bench*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 141, 146 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011), available at <http://www.dcf.state.fl.us/programs/humantrafficking/docs/LMHT.pdf> (“Let’s not punish them, let’s get them help.”).

84. *In re B.D.S.D.*, 289 S.W.3d at 894–95 (noting that otherwise “a juvenile could engage in conduct constituting prostitution without fear of adjudication”).

systematic and accurate data collection on this issue.⁸⁵ Accurate data is virtually nonexistent for numerous reasons, including the general lack of data on prostitution and other misdemeanor crimes;⁸⁶ the fact that juvenile records are sealed and rarely appealed, resulting in scant reported case law; lack of attention to juvenile prostitution by law enforcement in most jurisdictions;⁸⁷ and the widespread practices of girls lying about their age to be processed as adults, and of police and prosecutors charging minors with other offenses such as loitering or disorderly conduct.⁸⁸ Several of the problems inherent to the criminalization of juvenile prostitution, such as girls' variable status as victims or offenders, and the fact that most of these girls are vulnerable, traumatized, and distrustful of police and other authorities, compounds their invisibility.⁸⁹ Juvenile prostitution is becoming even more hidden from the general public as pimps advertise girls on the Internet and purchasers meet minors in hotel rooms or in private homes, away from public view.⁹⁰

It is clear, however, that the number of prostituted children is not small, with 100,000 children estimated to be prostituted each year, and between 100,000 and 300,000 children at risk.⁹¹ City-specific numbers are similarly high—an estimated 2,200 children are prostituted in New York City each year (deemed a “significant undercount[]” by the study’s authors), and 16,000 in Chicago each year.⁹² Experts agree that the problem is growing,

85. The DOJ observed that “the exact number of children who are victims of sex trafficking does not exist because comprehensive research is lacking.” KRISTIN M. FINKLEA, ADRIENNE L. FERNANDES-ALCANTARA & ALISON SISKIN, CONG. RESEARCH SERV., R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 6 (2011), available at <http://fas.org/sgp/crs/misc/R41878.pdf>.

86. See JESSICA ASHLEY, ILL. CRIMINAL JUSTICE INFO. AUTH., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND YOUTH IN ILLINOIS 1, 5, 21 (2008) (concluding that this lack of reporting made finding the number of prostituted children arrested in Illinois impossible).

87. See Mitchell, Finkelhor & Wolak, *supra* note 17, at 22.

88. *Id.* at 33. This occurs for multiple reasons, including well-meaning police officers and prosecutors who do not want to charge girls with prostitution itself and proof problems. *Id.* at 21–22.

89. *Id.* at 19, 33.

90. See FINKLEA, FERNANDES-ALCANTARA & SISKIN, *supra* note 85, at 2 (noting that technologies like the Internet have facilitated sex trafficking of children by connecting “buyers of commercial sex with trafficking victims while simultaneously distancing the perpetrator from criminal transactions”).

91. See ESTES & WEINER, *supra* note 6, at 4. All of the sources, including the government, concede that these numbers are likely underestimates. *Id.*

92. FRANCES GRAGG ET AL., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT 23, 92 (2007), available at

and that children are being prostituted at increasingly younger ages.⁹³ Many of the girls arrested are very young—the Department of Justice (DOJ) estimates that the average age of entry into the commercial sex industry is between eleven and fourteen years old.⁹⁴ The vast majority of those purchasing sex from minors are “almost exclusively” adult men.⁹⁵

These girls are extremely vulnerable, and their entry into the sex industry is usually prefaced by trauma.⁹⁶ Seventy to ninety percent of them have a history of sexual abuse, and the majority have also experienced physical abuse and/or extreme family dysfunction.⁹⁷ Sixty percent of prostituted children nationwide have run away from home.⁹⁸ Experts estimate that a runaway will be approached in an attempt to lure her into prostitution within forty-eight to seventy-two hours of leaving home.⁹⁹ In short, these girls are not well-off suburban teenagers

<http://www.ocfs.state.ny.us/main/reports/CSEC-2007.pdf>; Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 921 (2006); John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895, 904 (2007).

93. See Swecker Congressional Testimony, *supra* note 9; Eric Scigliano, *The Struggle to Control Seattle's Burning Underage Prostitution Problem*, CROSSCUT (Apr. 3, 2014), <http://crosscut.com/2014/04/sex-exploitation-seattle-homeless-youth-scigliano/> (indicating that a Seattle police officer reported that from the 1980s to now, 95 percent of the women in prostitution he encountered began as abused teenagers or children, with the only change being that in 2014 “the girls seem [even] younger”).

94. See Swecker Congressional Testimony, *supra* note 9. Almost half of prostituted children in certain jurisdictions were first exploited as young as age ten or eleven. GRAGG ET AL., *supra* note 92, at 40.

95. Finkelhor & Ormrod, *supra* note 7, at 8.

96. There is also a disproportionate representation of low income and racial minorities among these youth. See, e.g., GRAGG ET AL., *supra* note 92, at 86 (finding 67 percent of prostituted children in New York State are black); Peterson, *supra* note 18 (“The vast majority (of minors) are from families living in extreme poverty because traffickers prey on vulnerable children. . . .” (quoting Andrea Powell, Founder of FAIR Girls)).

97. See Swecker Congressional Testimony, *supra* note 9; see also GRAGG ET AL., *supra* note 92, at 31, 42 (reporting that 85 percent of prostituted children in that study had prior child welfare involvement); Sewell, *supra* note 72 (majority of prostituted minors arrested in Los Angeles had been in foster care). Police and others encountering these girls around the country often put the number who have been abused even higher. See, e.g., Kessler, *supra* note 10 (quoting a California police officer's estimate that “nine-and-a-half or ten out of ten” of the prostituted girls he encounters were first victims of sexual abuse); Scigliano, *supra* note 93 (quoting a Seattle prosecutor estimating that 80 percent to 90 percent of prostituted youth were sexually abused as children, with a “very high rate” of runaway youth involved).

98. FINKLEA, FERNANDES-ALCANTARA & SISKIN, *supra* note 85, at 32–33.

99. HEATHER J. CLAWSON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 10 (2009), available at <http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/>; *The Numbers*, NAT'L CLEARINGHOUSE ON FAMILIES & YOUTH, <http://ncfy.acf.hhs.gov/features/trafficking-and-runaway-youth/numbers> (last visited Apr. 18, 2015).

looking to earn spending money.¹⁰⁰ Instead, they are highly at risk for abuse, or seduction, by older men. As an FBI assistant director described them: "Many of them are what they call 'throwaway children'—they're children that really nobody wants. . . . They have no family structures, they have no viable friends."¹⁰¹

There is also significant evidence that girls are harmed by prostitution. Violence, including assault, rape, and robbery, is endemic to the commercial sex industry.¹⁰² Involvement in prostitution puts children at significant risk for mental health and substance abuse problems, as well as for sexually transmitted infections (STIs).¹⁰³ For this reason, the medical literature classifies these girls as victims of psychological and often physical trauma. Many of these harms, such as the risk of abuse and STIs, are also those recognized by legislatures and courts in justifying statutory rape laws.¹⁰⁴

Typical are these two accounts from a recent case and a media account. Lucilia was put in foster homes as a baby, after being injured during a dispute between her parents. At age five, she went to live with her grandmother.¹⁰⁵ From ages ten to twelve, an uncle sexually abused her, but her grandmother did not believe her, and whipped her with a TV wire, calling her a "liar and a whore." Lucilia went to live with her mother, where she was raped by her seventeen-year-old half-brother. After running away, Lucilia was picked up by two men in a car who offered her food and shelter for sex. Shortly afterward, she was recruited by an adult pimp, Romeo. She lived with five other prostituted girls under Romeo's control, and was arrested for prostitution when she was thirteen. She lied about her age, was processed as an adult and released. Arrested again a few months later, she gave her true age and was incarcerated in a juvenile

100. That is the incredible plot of a 2007 film "The Babysitters." THE BABYSITTERS (Forensic Films 2007).

101. *Child Prostitutes Rescued by FBI, Police*, WIBW (Feb. 23, 2009, 4:54 PM), <http://www.wibw.com/home/headlines/40126577.html> (quoting Daniel Roberts, Deputy Assistant Director, FBI). The children prosecuted in the cases described above bore many of the indicia of vulnerability discussed here. For instance, the girl in the Texas case was a runaway solicited into prostitution by her adult pimp. Petition for Writ of Certiorari at 2, B.D.S.D. v. Texas, 131 S. Ct. 1485 (2011) (No. 10-758), 2010 WL 4972110, at *2.

102. Finkelhor & Ormrod, *supra* note 7, at 8–9.

103. See Marty Beyer, *Delinquent Girls: A Developmental Perspective*, 9 KY. CHILD. RTS. J. 17, 20 (2001) (noting that girls that have experienced trauma often develop posttraumatic stress disorder, depression, and use drugs and alcohol to "numb the pain").

104. See *supra* notes 48–65 and accompanying text.

105. These facts are taken from the case outlined in Jessica Lustig, *The 13-Year-Old Prostitute: Working Girl or Sex Slave?*, N.Y. MAG., Apr. 2007, at 36, 38–40.

facility for over a year, despite cooperating in the successful prosecution of Romeo.

Jane Doe ran away from home at thirteen, and was soon prostituted by various pimps.¹⁰⁶ Jane came under the control of a pimp, DB, who “used physical violence, degradation and other coercive tactics [including having his name tattooed on her arm] to control [her].”¹⁰⁷ She was arrested and convicted for prostitution multiple times in New York, but she followed DB’s instructions and lied about her age. After these convictions, DB prostituted her in Washington, D.C., Virginia, and Florida. She was gang-raped and assaulted, but he would not allow Jane to go to the hospital. Despite the young age and other indicia of vulnerability of Lucilia, Jane, and thousands more, buyers of prostituted minors are not prosecuted for statutory rape and these girls continue to be viewed by police and prosecutors as offenders rather than victims.

B. Costs of This Approach

This section outlines the numerous costs of this punitive approach to juvenile prostitution. These include the harms to individual girls and criminogenic effects of sanctioning them, the high risk of selective enforcement, the failure to pursue child exploiters (the “real” offenders), and the accompanying legitimacy costs on the criminal law as a whole.

1. *Anti-Deterrent Effect and Individual Harms.* It is undisputed that girls need appropriate services and supports to permanently exit prostitution. In addition to safe housing, they need specialized treatment for the trauma they have suffered, other medical and psychological care, and job training and educational supports.¹⁰⁸ Otherwise, they are left with few economic or emotional options other than to return to their pimps. The complex psychological trauma of being prostituted often requires multiple interventions for a successful exit; accordingly, experts have found that exit takes at least three appropriate interventions.¹⁰⁹

106. These facts are taken from *People v. Doe*, 935 N.Y.S.2d 481, 482–83 (Sup. Ct. 2011).

107. *Id.*

108. See, e.g., CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 39 (2013) (noting that victims of sexual exploitation require comprehensive services including housing, legal and medical assistance, and social services).

109. *Id.* at 38 (indicating that the “continuum of care can be divided into three phases: (1) crisis intervention and assessment, (2) comprehensive assessment and case management, and (3) social reintegration”).

Criminal prosecution and incarceration do not help. On the contrary, the available data indicate that they further entrench girls in “the life.”¹¹⁰ Expressing frustration about the “revolving door” of arrest and incarceration, some police and prosecutors have themselves concluded that punishing girls to secure their testimony is extremely ineffective, and often renders them unlikely to ever seek assistance.¹¹¹ There are several reasons for this anti-deterrent effect. First, being prosecuted and treated as a criminal results, not surprisingly, in girls distrusting the police and others who seek to assist them.¹¹² Second, prosecution does not address the reasons most girls enter prostitution; and, third, it does not provide the services and housing that they need to escape the life.

The risk factors for entering prostitution are well documented, but the criminal justice system fails to address these underlying causes. Incarceration, probation, or other criminal sanctions do not address the histories of abuse and running away, which leave girls extremely vulnerable to exploitation.¹¹³ Experts name a lack of safe and supportive housing as the number one barrier to exit.¹¹⁴ There remains, however, virtually no such housing nationwide, leaving many girls after prosecution facing the Hobson’s choice of homelessness

110. MUSLIM, LABRIOLA & REMPEL, *supra* note 8, at 33, 39, 61, 64 (noting that law enforcement and the courts either incarcerate the girl with no services or place her back in the dysfunctional or abusive family she left, usually leading to her return to her exploiter and prostitution).

111. LLOYD, *supra* note 20, at 138 (“The cops knew that as soon as these jail stays were over, the girls would go right back.”); Camacho, *supra* note 83, at 141–46 (explaining how his years of prosecuting girls for prostitution, and then sentencing them to incarceration as a judge, led him to realize that prosecution is ineffective and unfair).

112. Aggressive police tactics, including sexual abuse, compound this dynamic. Abuse by police of prostituted minors is disturbingly widespread. For instance, “most” of the prostituted girls whom researchers interviewed in a New York study “reported trading sex with police officers to avoid arrests.” GRAGG ET AL., *supra* note 92, at 46. Even if they don’t abuse them, police often treat prostituted children so poorly that the girls distrust them, rendering cooperation very unlikely. Holly Austin Smith, *Law Enforcement Training: The Missing Service for Victims of Human Trafficking*, HOLLY AUSTIN SMITH (Sept. 20, 2012), <http://hollyaustinsmith.com/2012/09/> (quoting a former prostituted girl who after being treated with “disgust and scorn” by most police “flat out refused to cooperate”).

113. The shortage of appropriate services for girls in the juvenile justice system, particularly those who have been sexually abused and/or prostituted, is well documented. See, e.g., Francine T. Sherman, *Detention Reform and Girls: Challenges and Solutions: JDAI Pathways to Detention Reform #13*, at 19 (Bos. Coll. Law Sch., Legal Studies Research Paper Series, Research Paper No. 2005-02, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127252.

114. FINKLEA, FERNANDES-ALCANTARA & SISKIN, *supra* note 85, at 20 n.82; GRAGG ET AL., *supra* note 92, at 73.

or a return to their pimps.¹¹⁵ Tellingly, even though a majority of prostituted girls report a real desire to leave “the life,” they are usually left *less* able to do so after contact with the criminal system.¹¹⁶

Indeed, criminal prosecution itself brings many harms. The conditions in adult and even juvenile incarceration are deplorable, with girls convicted of prostitution or related nonviolent offenses being transported to and from court in leg shackles and handcuffs.¹¹⁷ Detention offers few health, mental health, or education resources, particularly for girls, and often leaves them worse off in these regards.¹¹⁸ Girls are more likely than boys to be abused or mistreated by staff while confined, and such abuse is often gendered, with girls being sexually assaulted or called “hos.”¹¹⁹ Experts have concluded that incarceration is likely ineffective and harmful for many minors, but it is particularly harmful to prostituted girls due to their traumatic histories and complex psychosocial needs.¹²⁰

Even those girls who are not incarcerated endure the stigma and collateral consequences of a delinquency or criminal

115. See, e.g., FINKLEA, FERNANDES-ALCANTARA & SISKIN, *supra* note 85, at 24 (reporting 2010 Senate committee testimony that only twelve organizations throughout the country provide specialized services for prostituted children, with only fifty beds among them).

116. Advocates working with prostituted girls report that most of the girls want to leave prostitution but are unable to do so because of the fear or psychological hold of their pimps and a lack of housing, employment, or a support system. See, e.g., RIC CURTIS ET AL., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 110 (2008) (87 percent of the girls interviewed unequivocally wanted to exit prostitution).

117. See Sherman, *supra* note 113, at 6 (identifying crowding as a serious problem); see also NAT'L JUVENILE JUSTICE NETWORK, UNCHAIN THE CHILDREN: POLICY OPPORTUNITIES TO END THE SHACKLING OF YOUTH IN COURT 1 (2014), available at http://www.njjn.org/uploads/digital-library/Shackling-in-Court-Hearing_FINAL.pdf (discussing the physical and psychological harm that occurs when all children appearing in juvenile court are shackled).

118. See *infra* notes 304–11 and accompanying text.

119. For instance, girls are at higher risk of sexual assault while incarcerated. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 231 (2006) [hereinafter OJJDP 2006 REPORT], available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

120. Deterrence by incarceration is particularly ineffective for low-risk, low-level offenders. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 12 (2011), available at <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>. New York state legislators noted this dynamic: “[S]ince the overwhelming majority of these youths have a history of psychological, physical or sexual abuse as younger children and many have been raised in poverty, simply arresting, prosecuting and incarcerating them as criminals did little more than re-traumatize survivors of sexual exploitation.” Press Release, Sheldon Silver, Assembly Speaker, Assembly Passes ‘Safe Harbour’ Legislation (June 19, 2008), available at <http://assembly.state.ny.us/Press/20080619/>.

adjudication.¹²¹ The harmful impact of even a misdemeanor conviction on employment and future success is well documented, and underlies the current movement to vacate past convictions for prostituted minors.¹²² The emotional stress and trauma associated with prosecution are compounded for juveniles.¹²³ Like incarceration, the experience of prosecution is particularly difficult for prostituted children, leading to near-consensus among experts “that prosecuting sexually exploited children re-traumatizes them and makes the process of leaving the streets more difficult.”¹²⁴ These girls suffer from low self-esteem, worthlessness, and guilt, which are likely to be exacerbated by the inherent message in prosecution that they are culpable for their exploitation.¹²⁵ In short, sanctioning prostituted children utterly fails to protect them—the cure is indeed worse than the disease.

2. *Selective Enforcement.* The current prosecution approach to prostituted girls also brings a significant risk of selective enforcement. The broad discretion of criminal law actors is an area of great concern to lawmakers and scholars. These concerns are heightened in the juvenile justice context, which has always built in additional discretion. Intended to accommodate the unique needs of minors, this discretion has frequently resulted instead in more punitive, arbitrary, or racially discriminatory treatment of certain groups.¹²⁶ Selective enforcement is also endemic to under-enforced crimes, such as statutory rape and prostitution.¹²⁷

121. See Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006) (identifying housing, future employment, enhanced future sentences, and immediate educational opportunities as potential collateral consequences of juvenile adjudication).

122. See, e.g., 725 ILL. COMP. STAT. ANN. 5/116-2.1 (LexisNexis Supp. 2014) (indicating that a motion to vacate a prostitution conviction for sex trafficking victims can be filed at any time following a verdict or finding of guilt).

123. *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402, at *5 (N.Y. Crim. Ct. Dec. 16, 2011) (observing this fact).

124. JACKIE ROSS, CORR. ASS'N OF N.Y., ADDRESSING KEY CRIMINAL JUSTICE ISSUES IN THE 21ST CENTURY 12 (2007). “Research demonstrates that these children have been victimized at a number of levels and that prosecution only compounds the harms they have experienced.” LYNCH & WIDNER, *supra* note 72, at 4.

125. LYNCH & WIDNER, *supra* note 72, at 12; *Samantha R.*, 2011 WL 6303402, at *1, *5.

126. See, e.g., Kim Taylor-Thomson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1137 (2006) (“In a system built on the exercise of discretion . . . , girls of color tend to benefit the least . . .”).

127. Sanford Kadish identified this problem with adult prostitution in his seminal work on overcriminalization. Sanford H. Kadish, *The Crisis of*

Based on these concerns, several state high courts have recently held that punishing a child under the statutory rape law intended to protect children is impermissible.¹²⁸ Significant to these holdings was the purpose of these laws to protect children against predators, usually adults, who manifest “vicious behavior.”¹²⁹ For instance, the Vermont Supreme Court noted the “tension goes beyond irony” of designating all minors engaged in consensual sex with each other simultaneously victims and offenders, concluding that the legislature could not have intended to stigmatize minors as child abusers.¹³⁰ The courts also reasoned that the conflation of the victim and offender roles led to a great risk of selective prosecution in determining which minors were victims and which were offenders. The Ohio Supreme Court found its statutory rape law to be unconstitutionally vague as applied to children under thirteen years old because the identities of the offender and the victim were unclear:

When an adult engages in sexual conduct with a child [this young], it is clear which party is the offender and which is the victim. But when two children [this young] engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.¹³¹

This lack of role clarity encourages selective, even discriminatory, enforcement.¹³²

The risk of selective enforcement is similarly present in the prosecutions of prostituted girls. The treatment of these girls varies widely across the country and even individual states, as

Overcriminalization, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 159–61 (1967); see also Michele Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 481 (“[J]udges interpret and enforce statutory rape cases in a manner that entrenches stereotypes and biases.”).

128. See, e.g., *In re D.B.*, 950 N.E.2d 528, 529–30, 533 (Ohio 2011) (finding Ohio’s statutory rape statute to be unconstitutional when it was applied to prosecute a twelve-year-old boy for sex with an eleven-year-old boy); *In re Z.C.*, 165 P.3d 1206, 1207, 1213 (Utah 2007) (reversing a delinquency finding against a thirteen-year-old girl for statutory rape of a twelve-year-old boy and vice versa, where each child was the victim in one case and the offender in another); *In re G.T.*, 758 A.2d 301, 302, 309 (Vt. 2000) (reversing a delinquency adjudication against a fourteen-year-old boy for statutory rape of a twelve-year-old girl).

129. See *In re D.B.*, 950 N.E.2d at 532 (quoting OHIO REV. CODE ANN. § 2907.02 cmt. (LexisNexis 2014)).

130. *In re G.T.*, 758 A.2d at 305.

131. *In re D.B.*, 950 N.E.2d at 533.

132. *Id.* at 529–30, 532–33 (finding it particularly problematic where, like here, the defendant was engaging in same-sex sexual activity, suggesting potential selective enforcement against LGBT minors).

well as between the state and federal systems.¹³³ This variation is compounded by the fact that demeanor, compliance, and other arbitrary circumstances largely determine how prostituted girls will be treated by police, prosecutors, and judges. In short, the extremely important designation of victim or offender is often made on criteria having nothing to do with the retributive or deterrence goals of the criminal law.¹³⁴

3. *Missing Victims and a Pass for the Real Offenders.* Many if not most people prefer not to know about prostituted children, wishing to ignore this uncomfortable issue.¹³⁵ Indeed, some continue to opine that juvenile sex trafficking does not occur “here,” but only in far off countries such as Thailand or Ukraine.¹³⁶ This is true not only of the general public, but of criminal justice actors. Studies show that many police departments across the country continue to deny that prostituted minors exist in their jurisdictions, even in the face of countervailing evidence.¹³⁷ Police officers sometimes profess to believe girls who lie about their age, even girls as young as twelve or thirteen. When they know they are minors, many arrest girls without asking them about the circumstances of their prostitution.¹³⁸ Experts suggest that this “tacit ignorance” may be

133. For instance, federal prosecutors have prosecuted pimps for trafficking American-born minors, treating the minors as victims throughout the proceedings. Telephone Interview with former prosecutor (Jan. 6, 2014). State prosecutors, to the contrary, have largely continued to routinely prosecute minors for prostitution. *See infra* notes 191–98 and accompanying text (discussing the difference between state prostitution laws and federal anti-trafficking laws).

134. *See infra* Part III.A–B (discussing the retributive and deterrence goals of criminal law). As one expert writes: “I hope and pray with each [prostituted] girl that they get a ‘good’ cop, a supportive judge, an understanding prosecutor. There are too many girls . . . who just don’t get that lucky.” LLOYD, *supra* note 20, at 143–44.

135. Numerous judges and advocates cite this as a significant challenge. As one judge described it: “When you begin to discuss these girls, people turn away and don’t want to hear. . . .” Telephone Interview with judge and former prosecutor (Feb. 7, 2014). At least one commentator has suggested that punishing, particularly incarcerating, these girls is primarily a way to remove them from our collective sight and guilt. Jonah Spangenthal-Lee, *Incarcerate the Victim: King County Seeks Harsh Punishment for Teen Prostitute*, STRANGER (Mar. 22, 2007), <http://www.thestranger.com/seattle/Content?oid=180560>. Also reflecting this myopia, when Jodie Foster portrayed a twelve-year-old prostituted girl in the iconic *Taxi Driver*, critics were more concerned about the actress’s mental health after *playing* this part rather than the many actual young girls being prostituted. *See* Boze Hadleigh, *Jodie Foster Interview*, MEDIASCENE PREVUE, Mar.–June 1992, available at <http://www.oocities.org/jodiefosterph/mprevue030192.html>.

136. Matthew Segal, *Q&A: Mike Kessler Reveals the Unsavory Truth About Child Prostitution in L.A.*, L.A. MAG. (Oct. 20, 2014), <http://www.lamag.com/thejump/qa-mike-kessler-reveals-unsavory-truth-child-prostitution-l/>.

137. NRC, *supra* note 7, at 203.

138. *See, e.g.*, Segal, *supra* note 136 (noting that “it’s easier [for law enforcement] to turn the other cheek, or to blame the victim”); *see also* KATE MOGDALESCU & KATHERINE MULLEN, COUNCIL OF THE CITY OF N.Y. COMM. ON WOMEN’S ISSUES & COMM. ON PUB.

intentional because recognizing that those being prostituted are underage means undergoing the inconvenience that arresting minors entails, as well as coming face-to-face with the collective guilt.¹³⁹ The discomfort criminal justice actors have with these cases, coupled with the dearth of other options for addressing these girls' needs, pressures them to classify these high-needs girls as offenders. Accordingly, despite police protocols to search missing child reports when encountering runaway or unaccompanied minors, police sometimes do not do so when they arrest minors for prostitution.¹⁴⁰ Courts are also sometimes willfully blind about the victimhood, actual or legal, of prostituted girls.¹⁴¹

The denial of girls' victimhood, and their treatment as offenders, also exonerates those who are the most culpable for the harm to children. The focus on prosecuting the prostituted girls themselves detracts from pursuing the pimps and customers exploiting children, leading the DOJ to acknowledge that these men "have largely escaped accountability for many years."¹⁴² Prosecutors also acknowledge that the vast majority of sex buyers are not arrested or prosecuted.¹⁴³ The figures below demonstrate the vast discrepancies in punishment between

SAFETY, TESTIMONY, OVERSIGHT: COMBATING SEX TRAFFICKING IN NYC: EXAMINING LAW ENFORCEMENT EFFORTS—PREVENTION AND PROSECUTION 9 (2011) (reporting that despite having arrested minors for prostitution, an officer of the NYPD "could not define sex trafficking, was unaware that New York had an anti-trafficking law, and had never been trained on the risk of commercial sexual exploitation of minors").

139. Segal, *supra* note 136; see LLOYD, *supra* note 20, at 137 ("Underage involves having to contact a parent, calling Children's Services, waiting hours for a social worker to show up, a paperwork hassle, a night ruined, chained to a desk with a defensive teenager.").

140. See MOGDALESCU & MULLEN, *supra* note 138, at 4–5 (describing a case where a fifteen-year-old girl listed on the national registry of missing children was arrested by police and, per her pimp's instructions, said she was eighteen, whereupon the police took no steps to ascertain her true identity or age and processed her through criminal court as an adult). Most prostituted youth, however, are not listed on the registry; pimps target children "who won't be missed." Peterson, *supra* note 18 (quoting one service provider noting that out of the over 300 girls they have served, only two were reported missing, often because they were in foster care). The fact that they are not missed further distances these children from the standard victim paradigm, facilitating their identification as offenders. See *infra* Part III.A.2 (discussing how prostitution laws reflect the invisibility of prostituted persons and treat them as barely human).

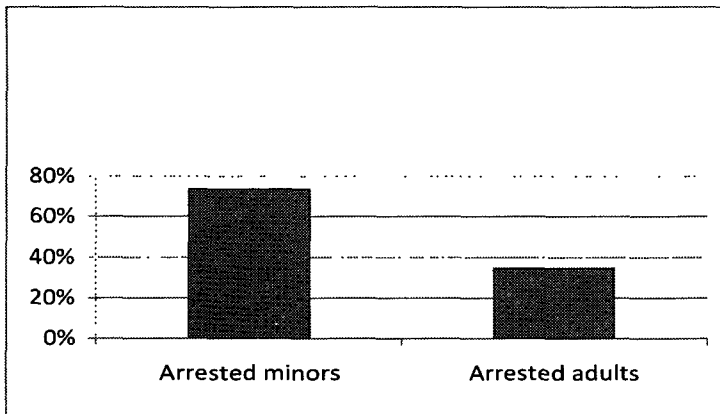
141. Both the *Nicolette R.* and *B.D.S.D.* courts refused to consider the girls' status as victims of statutory rape, or their actual victimhood. See *supra* notes 79–84 and accompanying text.

142. NRC, *supra* note 7, at 161; DEPT OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 34 (2010).

143. See, e.g., Sara Jean Green, *Tougher Police Tactics Stinging Sex Buyers*, SEATTLE TIMES, Oct. 15, 2014, <http://www.seattletimes.com/seattle-news/tougher-police-tactics-stinging-sex-buyers/> (citing a prosecutor that buyers are rarely arrested, and only then after they have repeatedly purchased girls and women for sex, some up to "hundreds of times").

prostituted girls and either their customers or their pimps. For instance, over a twenty-five-year period in New York City, prostituted minors were arrested over ten times as often as their customers and almost six times as often as their pimps.¹⁴⁴ A similar pattern is evident in other jurisdictions.¹⁴⁵

FIGURE 2: RELATIVE NUMBER OF ARRESTS OF PROSTITUTED MINORS AS OFFENDERS AND OF ADULT EXPLOITERS WHEN THE MINORS ARE DESIGNATED VICTIMS (NATIONAL STUDY)¹⁴⁶

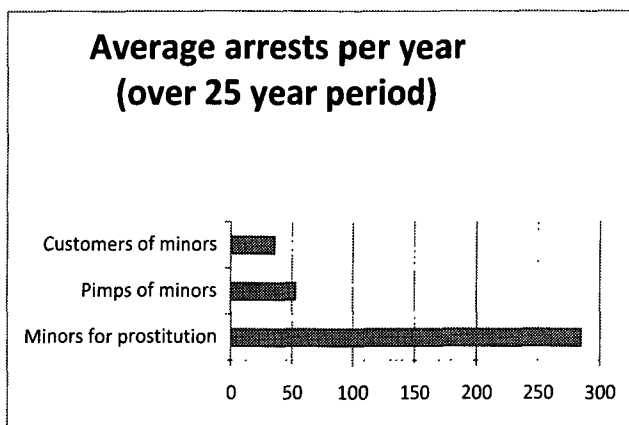


144. See *infra* Figure 3.

145. For instance, in Seattle, until recently, “women and girls involved in prostitution were arrested up to ten times more often than sex buyers, and were three to four times more likely to face prosecution.” Green, *supra* note 143.

146. See Finkelhor & Ormrod, *supra* note 7, at 9.

FIGURE 3: RELATIVE NUMBER OF ARRESTS OF PROSTITUTED MINORS, THEIR PIMPS, AND THEIR JOHNS (NYC STUDY)¹⁴⁷



Girls are not only arrested and prosecuted far more frequently than their exploiters, but are also punished more severely. Prostitution customers, even those purchasing sex from minors, rarely face incarceration, in stark contrast to the minors themselves.¹⁴⁸ Indeed, a handful of jurisdictions do not sanction solicitation, and most impose minor sanctions such as fines.¹⁴⁹ Pimps are more likely to be sanctioned than customers, but they also receive less law enforcement focus than prostitutes themselves.¹⁵⁰ Tellingly, police officers across the country report that gangs and other criminal organizations are increasingly pimping young girls because it is “a very low-risk, high-reward activity,” particularly compared to possessing or selling drugs or weapons.¹⁵¹

147. See MUSLIM, LABRIOLA & REMPEL, *supra* note 8, at 12, 19 (also noting that interviews of law enforcement revealed that “arresting [johns] was not seen as a way to stop the problem” and “requires resource-intensive undercover police work”).

148. See *supra* notes 142–47 and accompanying text. This is starting to change, with some jurisdictions enacting statutes that punish solicitation of minors more severely than regular solicitation. VA. CODE ANN. § 18.2-346 (2014); TEX. PENAL CODE ANN. § 43.02 (West 2013). To be effective, however, police, prosecutors and judges need to enforce these higher penalties.

149. For instance, the Model Penal Code treats buying sex as a violation, while selling sex is a misdemeanor. Compare MODEL PENAL CODE § 251.2(5) (1980), with MODEL PENAL CODE § 251.2(1)–(2). The law on the books for both offenses is now equal in most states, but in some it still punishes selling sex more severely than buying it. See, e.g., NEB. REV. STAT. §§ 28-801, 28-106 (2008) (outlining the sentence for prostitution of up to a year incarceration and a fine of \$1,000, while purchasing sex is punishable by fines of \$200–\$500).

150. See, e.g., Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 569 n.277 (2000) (reporting that a data review revealed “almost no evidence of prosecution for pimping or pandering”).

151. Scigliano, *supra* note 93 (quoting a Seattle Police Department captain contrasting pimping with drugs and guns and reporting that even those arrested and

Some commentators conclude that this is largely intentional; because it is easier to prosecute prostitutes than pimps, police and prosecutors are simply focusing on the “low-hanging fruit” to keep their numbers up rather than actually pursuing the most culpable offenders or changing the system.¹⁵² The ease with which customers can be caught when prosecutors and police focus further supports the argument that it is not a priority in most jurisdictions. For instance, one suburban county recently initiated a sting operation and arrested 104 sex buyers in one month with minimal resources.¹⁵³ Only 39 had been arrested during the entire previous decade.¹⁵⁴ Barriers to sanctioning child exploiters extend beyond resources and police priorities to societal attitudes condoning purchasing sex, and ignoring the extent to which this practice harms girls and women.¹⁵⁵ To cite

convicted serve short sentences before they return to exploit more girls); *see also* Ian Urbina, *For Runaways on the Street, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1 (quoting a Boston police detective: “Gangs used to sell drugs. . . . Now many of them have shifted to selling girls because it’s just as lucrative but far less risky.”).

152. Mitchell, Finkelhor & Wolak, *supra* note 17, at 30 (documenting the failure by police to vigorously pursue customers and pimps of prostituted children); Christina M. Becker, Note, *Violating Due Process: The Case for Changing Texas State Trafficking Laws for Minors*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 85, 90 (2013); *see also* Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 319 (2012) (reporting the high conviction rate for prostitution as compared to almost all other crimes); Larry Neumeister, *Public Shaming of Prostitution Clients a Growing Trend, Can Harm Families*, HUFFINGTON POST (Oct. 14, 2012, 10:06 AM), http://www.huffingtonpost.com/2012/10/14/shaming-prostitute-patrons-johns-public_n_1964925.html (quoting a Detroit prosecutor as acknowledging that they did not prosecute any of the “30,000 or so clients” of a sex ring operating in the city for over a decade).

153. William Murphy & Ann Givens, *Long Island Prostitution Sting, ‘Operation Flush the Johns,’ Leads to Arrests of 104 Men*, HUFFINGTON POST (June 3, 2013, 7:37 PM), http://www.huffingtonpost.com/2013/06/03/nassau-da-lawyers-docs_n_3380219.html; *see also* Green, *supra* note 143 (reporting that a concerted effort in Washington State over three months led to 105 arrests of men for solicitation, 25 for soliciting a minor, which almost equals the number of men arrested in twenty-five other cities in the state for the same period, whose police departments did not focus on solicitation).

154. Murphy & Givens, *supra* note 153.

155. A full discussion of this pervasive attitude is beyond the scope of this Article, but it is well documented. The Model Penal Code comments to solicitation express skepticism about implementing harsher penalties for sex buyers because of the “common perception of extra-marital intercourse as a widespread [normal] practice.” MODEL PENAL CODE § 251.2 cmt. 6 (1980); *see also* U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR PROSTITUTION (2011) (arguing that we must “reject[] long-held notions that regard commercial sex as a ‘boys will be boys’ phenomenon, and instead send[] the clear message that buying sex is wrong”); Law, *supra* note 150, at 568 (“[P]olice agencies, and the public at large, are reluctant to expose customers to embarrassment because they are ‘mostly white, married men with at least a little disposable income. Real people, that is.’” (quoting Margaret A. Baldwin, *Strategies of Connections: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 74 (1993))). In some instances, police themselves embody this attitude, demanding sex from prostituted minors in exchange for no arrest,

just one example, after intense public sympathy for the men arrested in the sting outlined above, the county prosecutor reversed course and allowed virtually all of the sex buyers to plead guilty to a reduced charge which brought no criminal record or other meaningful sanction.¹⁵⁶

4. *The Legitimacy Drain.* A final problem with the current approach to prostituted girls is that punishing a person who is not culpable, and is arguably a victim, is quite simply unjust. Criminalizing self-harm or violations of moral norms, rather than societal harm, has been widely discredited. Numerous scholars have outlined the costs of such overcriminalization. These harms include an inefficient use of resources, a lack of transparency about the use of the criminal law to impose social or moral norms, particularly contested ones, widening racial and social divisions, and “a tendency towards authoritarianism.”¹⁵⁷ The greatest harm is the erosion of the criminal law’s legitimacy, and concomitant power to proscribe behavior, when it sweeps in behaviors that are not harmful or wrongful. As Sanford Kadish noted, overcriminalization denigrates the whole criminal justice system.¹⁵⁸

Political oversight is not an effective check on these potential abuses. Criminalization is an overly simplistic and politically costless solution to complex social problems, rendering oversight scant. This is particularly true of misdemeanor crimes such as prostitution in which the public takes little interest, and for which there is little to no appellate review or political discussion

or otherwise harming them. See, e.g., LLOYD, *supra* note 20, at 124; Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution* 15 (2007), available at <http://economics.uchicago.edu/pdf/Prostitution%205.pdf?q=opportunity-analysis-is>.

156. William Murphy, “*Flush the Johns*” Defendants Now Can Plead to Reduced Charge, DA’s Office Says, *NEWSDAY* (June 4, 2014, 9:52 PM), <http://www.newsday.com/long-island/nassau/flush-the-johns-defendants-now-can-plead-to-reduced-charge-da-s-office-says-1.8333288>. The reluctance to punish customers of prostitution because it will ruin their families and careers underlies the significant opposition to “shaming” sanctions for sex buyers. The same concern is not usually accorded other offenders, including those engaged in prostitution. CAL. CHILD WELFARE COUNCIL, *supra* note 108, at 42 (quoting MICHAEL SHIVELY ET AL., *A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS* viii (2012)).

157. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 204–05 (2001).

158. Kadish, *supra* note 127, at 166 (“Not only does the use of the criminal law, therefore, divert substantial law-enforcement resources away from genuinely threatening conduct, but the whole criminal-justice system is denigrated by the need to process massive numbers of pathetic and impoverished people through clumsy and inappropriate procedures.”).

of the costs versus benefits of criminalization.¹⁵⁹ Compounding this dynamic is the juvenile context, where closed proceedings and an extreme lack of data further reduce transparency.¹⁶⁰ Framing the problem of child sexual exploitation as one of individual pathology or wrongdoing implicitly condones the systemic exploitation of girls.¹⁶¹

The legitimacy drain is particularly large in the current case because prostituted girls are harming only themselves, and are victims in both a legal and socio-medical sense. Sanctioning this vulnerable group, particularly while their exploiters usually go unpunished, reveals a glaring gap between the law and an inherent sense of justice.¹⁶² As one criminal court judge recently asked: “How far away are we from flogging the child rape victim in the public square, or stoning her to death, while the man who had sex with her remains anonymous?”¹⁶³

III. POTENTIAL RATIONALES FOR PUNISHMENT

This Part considers possible rationales for the punishment of prostituted girls. My examination of potential rationales goes beyond the stated justifications for criminalizing prostitution by minors for two reasons. First, statutory and case language is virtually silent on this issue; the laws governing prostitution do not consider age.¹⁶⁴ This may be because vice crimes are misdemeanors and thus largely ignored, or because legislators and others until very recently overlooked the large number of girls engaged in and prosecuted for prostitution.¹⁶⁵ Accordingly, I will consider illustrative justifications for punishing adult

159. See *id.* at 161–62, 168.

160. See Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671, 699–701 (2012) (explaining the drawbacks of closed juvenile proceedings, including lack of transparency); Annitto, *supra* note 20, at 7 & n.17.

161. See, e.g., Segal, *supra* note 136 (“Until everyone understands that these girls are victims rather than ‘hookers,’ then people will continue to ignore the problem, or blame the victim, which is far easier than facing it down.”).

162. The criminal law undoubtedly has an expressive function. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 497–98 (1999) (arguing that criminal justice goals framed in terms of deterrence often have expressive goals). The practice discussed herein sends the message that girls are responsible for their own victimization and that their exploiters are not real offenders.

163. *Complaint Charging 16 Year-Old with Prostitution Facially Insufficient*, N.Y. L.J., May 10, 2013, at 21 (*People v. Christine C.* case) (dismissing a prostitution complaint against a sixteen-year-old girl as facially insufficient because the girl was too young to consent).

164. An exception is the very recent legislation in a few states partially decriminalizing prostitution for minors. See *infra* Part V.B.

165. See *supra* notes 135–41 and accompanying text (discussing American society’s “tacit ignorance” of child prostitution).

prostitution and extrapolate from them to the juvenile context.¹⁶⁶ Second, my concern is with the law on the ground, with what is actually happening on the streets and in trial and juvenile courts. There is an internal dynamic to criminal law that goes beyond the law on the books to incorporate enforcement patterns and other practices.¹⁶⁷ To focus on the former, particularly in the context of an under-documented area such as juvenile prostitution, would show us only a piece of the puzzle. To this end, I also consider rationales or explanations offered by criminal justice actors, such as police officers, prosecutors, and judges. This is particularly significant in the context of juvenile prosecution as the criminal justice actors have enormous discretion in this realm to determine whether a prostituted girl is a victim or an offender, and if the latter, what type of punishment she will face.¹⁶⁸

Punishment theories justify sanctions to give an offender what she deserves, to prevent future harm, or, ideally, to do both.¹⁶⁹ This Part considers and finds lacking traditional retributive and utilitarian justifications for punishing prostituted girls. They are lacking because they are ineffective at achieving their stated goals and, in the case of retributivism, theoretically incoherent. I then turn to the most frequently offered rationale, that girls are punished to protect them from the harms of prostitution.¹⁷⁰ This rationale is also flawed. Paternalism is almost always deemed to be an improper basis for criminal sanctions, bringing more harm than good. The lack of services

166. I surveyed statutes and am including a representative sample of the justifications offered. Comment to the Model Penal Code's prostitution provision offers an overview of the most common justifications:

Religious and moral ideals no doubt provided the chief impetus for suppression, but several utilitarian considerations also supported that solution [including]: (i) prostitution was an important factor in the spread of venereal disease; (ii) prostitution was a source of profit and power for organized crime and was frequently combined with illicit drugs, illegal gambling, and even robbery and extortion; (iii) prostitution was a major source of corrupt influence on government generally and of law enforcement in particular; and (iv) prostitution was viewed as a significant factor in encouraging social disorganization by undermining fidelity to home and family.

MODEL PENAL CODE § 251.2 cmt. 1 (1980) (footnotes omitted).

167. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW* 27 (2008) ("The *real* law—the law that distinguishes the conduct that leads to punishment from the conduct that does not—cannot be found in criminal codes.”).

168. See *supra* Part II.B.2; *infra* Part III.C.

169. Michael T. Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25, 27 (Mark D. White ed., 2011).

170. Although courts and criminal justice actors cite combating sex trafficking and exploitation as a reason to criminalize prostitution, no statute includes this justification. See *infra* notes 228–30 and accompanying text.

and treatment for prostituted girls in the juvenile justice system further put the lie to a protective justification.

A. Retribution: *Greed v. Love*

1. *Just Deserts.* One of the two major justifications for punishing individuals who engage in certain conduct is retribution. In short, people are punished because they “deserve it.”¹⁷¹ Perhaps reflecting changing social mores, these retributive justifications are less frequently used in recent decades.¹⁷² Nonetheless, explicitly stated justifications for punishing prostitution include promoting public morality¹⁷³ and protecting family life.¹⁷⁴

Retributive rationales do not justify sanctioning prostituted girls as they are minors, they are not deserving of punishment, and they are in fact victims both nominally and actually. As to the first point, the Supreme Court has recently recognized that juveniles are less morally culpable than adults.¹⁷⁵ As Justice Kagan concluded in *Miller v. Alabama*: “Because [t]he heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’”¹⁷⁶ This lower culpability should apply to minors prosecuted for prostitution, particularly those at the younger end of adolescence.¹⁷⁷ Second, it is a well-established legal principle that young people below a certain age cannot

171. Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089 (2010).

172. ZIMRING & HARCOURT, *supra* note 67, at 96. Many of these justifications, however, remain on the books, as illustrated by the statutes cited below. See *infra* notes 173–74 and accompanying text.

173. See, e.g., COLO. REV. STAT. § 18-7-201 (2013) (“Offense[] Relating to Morals”); TEX. PENAL CODE ANN. § 43.02 (West 2013) (Offenses Against Public Order and Decency); VA. CODE ANN. § 18.2-346 (2014) (Crimes Involving Morals and Decency); see also Cherry v. Koch, 491 N.Y.S.2d 934, 944 (Sup. Ct. 1985) (“[T]here is unquestionably a control in the states over the morals of their citizens which extends to making prostitution a crime . . .” (quoting Hoke v. United States, 227 U.S. 308, 321 (1913))).

174. See, e.g., MONT. CODE ANN. § 45-5-601 (West 2009) (categorizing prostitution offenses as “Offenses Against the Family”); Roe v. Butterworth, 958 F. Supp. 1569, 1582 (S.D. Fla.) (writing that the state “has a particularly strong interest in protecting the sanctity and strength of family and marital relationships” which “justifies the criminal prohibition against prostitution, as most patrons of prostitutes are married men”), *aff’d*, 129 F.3d 1221 (11th Cir. 1997).

175. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).

176. *Miller*, 132 S. Ct. at 2465 (alteration in original) (quoting *Graham*, 130 S. Ct. at 2028).

177. But see, e.g., *In re Nicolette R.*, 779 N.Y.S.2d 487, 487 (App. Div. 2004) (declining to dismiss prostitution charges against a twelve-year-old girl).

consent to many things including the two acts at issue here: a contract for the sale of goods and sex.¹⁷⁸

The realities of juvenile prostitution further undercut the notion of desert. These girls are usually from troubled family backgrounds, and the majority have already suffered abuse of some type before entering the commercial sex industry.¹⁷⁹ Most prostituted girls are under the control of pimps, who frequently use violence to maintain their control.¹⁸⁰ Girls are isolated from sources of support and become reliant—economically, psychologically, and physically—on their pimps. Tactics pimps use to this end include forcibly tattooing their names on girls, requiring that girls call them “daddy” and obey their commands, and mandating that girls channel all their money through them.¹⁸¹ Because of this widespread dynamic, girls usually do not profit from prostitution; instead, their pimps do.¹⁸²

The dynamic between many girls and their pimps calls into question the greed versus love dichotomy itself. Like child abusers, pimps “groom” girls to enter prostitution, targeting vulnerable children, romancing them, deceiving them, and using psychological and physical force and threats to control them and keep them in “the life.” During the recruitment process, a pimp acts as a girl’s “boyfriend,” breaking down her self-esteem and often preventing her from realizing that she is a victim.¹⁸³ As experts describe it: “[These] are children that are disaffected, they are from broken homes, . . . they are looking for someone to

178. See discussion *supra* notes 56–65 and accompanying text (discussing the age of consent to sex); see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (“Infants”) (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

179. See *supra* notes 96–101 and accompanying text (citing family trauma as a starting point for most child prostitutes).

180. ESTES & WEINER, *supra* note 6, at 110.

181. See, e.g., *People v. Doe*, 935 N.Y.S.2d 481, 482 (Sup. Ct. 2011) (detailing common behaviors of pimps to maintain control); Ashley Powers, *Hostages of Child Prostitution*, L.A. TIMES (Oct. 6, 2011), <http://articles.latimes.com/2011/oct/06/nation/la-na-teen-prostitutes-20111007> (“[Pimps] were masters at manipulating and dominating the teenagers. They sweet-talked the girls in shopping malls and Greyhound terminals, bought them pedicures and wigs, plied them with drugs and gave them the attention they craved. Once ensnared and working as prostitutes, the girls could fall victim to pistol-whippings and gang rape—sometimes, even worse.”).

182. See Jennifer Sullivan, *Prostitute, 15, Couldn’t Find Help to Get Out*, SEATTLE TIMES, Feb. 26, 2008, <http://community.seattletimes.nwsource.com/archive/?date=20080226&slug=childprostitution26m> (quoting one fifteen-year-old: “The greatest joy for me back then was to bring [my pimp] money”).

183. See Urbina, *supra* note 151.

take care of them. . . . *A lot of these kids feel like they are in love [with their pimps].*"¹⁸⁴

Finally, a central tenet of retributivist theory is that the punishment must be proportionate to the wrongdoer's desert.¹⁸⁵ Even assuming *arguendo* that some level of punishment of prostituted minors were justified, what they receive is far too harsh in comparison to the lack of consequences or "slaps on the wrist" accorded their exploiters.¹⁸⁶

2. *Victim Vindication.* The more specialized theory of victim vindication retributivism further undermines this justification. Jean Hampton posited that retributive punishment is warranted where a wrongful action diminishes the value of the victim.¹⁸⁷ Victims are harmed in two ways by wrongdoers: (1) by injuring the victim, the wrongdoer conveys that the victim is less worthy of dignity and respect than all people intrinsically are; and (2) the wrongdoer's "insulting" actions state that he is worth more than his victim.¹⁸⁸ Rectifying these "moral injuries" lies at the heart of the state's retributive duty.¹⁸⁹ Hampton and other scholars have noted that women and children are the archetypal victims and crimes against them are often sanctioned more severely.¹⁹⁰

Minors who engage in sexual activity with older men are victims under statutory rape laws and state and federal trafficking laws.¹⁹¹ The Trafficking Victims Protection Act (TVPA) was enacted "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to

184. Carol Cratty, *FBI: Nationwide Child Prostitution Sweep Leads to 104 Arrests, 79 Children Rescued*, CNN (June 29, 2012), <http://www.cnn.com/2012/06/25/us/child-prostitution/> (emphasis added) (quoting the FBI acting executive assistant director and the president of the National Center for Missing and Exploited Children).

185. HUSAK, *supra* note 167, at 82.

186. See *supra* notes 138–51 and accompanying text.

187. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992) (internal quotation marks omitted).

188. See *id.* at 1670–72, 1677.

189. *Id.* at 1686, 1698.

190. See *id.* at 1682–85; see also FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 26 (2004) ("The offenses that cause most public concern . . . are crimes of sexual force and predatory abuse of children and youth who lack the capacity to judge the intentions of others or to defend themselves from the sexual aggression of exploitative adults."); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 539–40 (2009). As discussed further below, however, this status is often limited to white, middle-class women and children. See *infra* Part IV.A.2.

191. The discussion will focus on the federal TVPA, but over thirty states have enacted anti-trafficking legislation to date. Xin Ren, *Legal Protection and Assistance for Victims of Human Trafficking in the United States: A Harm Reduction Approach*, in JUSTICE FOR VICTIMS 140, 146 (Inge Vanfraechem et al. eds., 2014).

ensure just and effective punishment of traffickers, and to protect their victims.”¹⁹² The Act explicitly notes the connection between prostitution and trafficking: “The sex industry has rapidly expanded [recently]. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution”¹⁹³ Although all victims are nonoffenders under the TVPA, the Act specifically distinguishes between adult and child victims. Prostituted minors under eighteen need not prove “force, fraud, or coercion” to show trafficking as adult victims must, and all minors are deemed victims of “severe trafficking,” rendering their traffickers subject to increased penalties, including a possible life sentence.¹⁹⁴

Prostitution laws are significantly out of step with anti-trafficking laws, although they are much more often enforced.¹⁹⁵ Tellingly, no statute criminalizing prostitution, including pimping and buying sex, is justified based on the exploitation of those sold for or selling sex.¹⁹⁶ This further reflects the invisibility of prostituted persons.¹⁹⁷ Yet the harm is even greater than that to other victims whose victimhood goes unrecognized. Sanctioned for the trauma done to them, prostituted girls are treated as not worthy of societal protection, as barely human.¹⁹⁸ This approach turns both the compensatory and expressive functions of victim-centered retribution upside down.

B. Utilitarianism: Cleaning up the Streets

Utilitarian justifications look forward to the effects of punishment on future crime, and include deterrence, incapacitation, and rehabilitation. Although the juvenile justice system has at times been nominally rehabilitative, experts agree that its mission and practice have always been quite punitive and have recently become more so.¹⁹⁹ More children are tried and

192. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(a) (2012) (reauthorized 2013).

193. *Id.* § 7101(b)(2).

194. *Id.* § 7102(8)(A); *id.* § 7105(b)(1)(A), (C); *id.* § 7105(c)(1)(A)–(B); *id.* § 7109(b); 18 U.S.C. § 1581 (2012).

195. *See supra* notes 142–56, 191–94; *infra* notes 196–98.

196. Indeed, prostitution is widely referred to as a “victimless” crime with the most commonly cited harm being to the general public order. *See supra* notes 173–74 and accompanying text.

197. *See supra* notes 135–41 and accompanying text.

198. *See supra* notes 45–47 and accompanying text (describing terminology sometimes used to refer to sex workers such as “no humans involved”).

199. *See, e.g.,* Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 260 (2009).

sentenced as adults, and minors are often incarcerated in facilities indistinguishable from adult prisons.²⁰⁰ Accordingly, I will focus here on the primary justification, deterrence.

The most frequent rationales currently offered for punishing prostitution are instrumental ones—to prevent the spread of STIs and other public health threats,²⁰¹ to maintain public order and deter crime related to prostitution,²⁰² and to secure cooperation against pimps.²⁰³ Prevention of more generalized harm is particularly valuable in justifying punishing so-called victimless crimes, such as prostitution.²⁰⁴ Again these rationales fail because punishment of prostitution fails to deter; in fact, I have argued that it has a crimogenic effect.²⁰⁵ Concomitantly, punishment of victims to secure cooperation is both unjust and ineffective.

1. *Deterrence.* Deterrence encompasses both general deterrence, for the population as a whole, and individual deterrence, for that particular offender. Effective deterrence requires that people be aware that the behavior at issue is punishable, that they are able to calculate the costs and benefits of their behavior, and that such a calculation leads them to conclude that the costs of certain behavior, particularly in terms of criminal sanctions, outweigh the benefits.²⁰⁶ These conditions are absent in the case of juvenile prostitution.

The likely failure of many sanctions to measurably deter many people's conduct is well documented.²⁰⁷ There is also little empirical

200. See Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1028, 1052, 1092 (2005); Megan Annitto, *Graham's Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller*, 80 BROOK. L. REV. 119, 122 (2014) (describing how policy shifted in the 1990s to allow more juveniles to be tried and sentenced as adults).

201. See, e.g., ALA. CODE § 13A-12-121 (LexisNexis 2005) ("Offenses Against Health and Morals"); *State v. Taylor*, 808 P.2d 314, 317 (Ariz. Ct. App. 1990) ("Among the various supportive rationales are preventing communicable disease . . .").

202. HAW. REV. STAT. § 712-1200 cmt. (West 2013) ("Legalizing prostitution would decrease the prostitute's dependence upon and connection with the criminal underworld and might decrease the danger that 'organized crime' might be financed in part by criminally controlled prostitution.").

203. See *infra* Part III.B.2 (discussing the utilitarian goal of securing cooperation of juveniles in prosecution against their pimps).

204. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 149–52 (1999) (arguing that these deterrence/harm prevention arguments may be "window dressing" for the old moral arguments against prostitution).

205. See *supra* Part II.B.1 (discussing the "revolving door" effect of the criminal justice system with respect to underage prostitutes).

206. Robinson, *supra* note 171, at 1093.

207. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951, 1001 (2003).

support demonstrating that harm prevention is achieved by prosecuting prostitutes. At least one legislature has recognized this fact.²⁰⁸ This lack of deterrence is compounded in the case of minors. The Supreme Court has recognized that adolescents are more impulsive and less able to control their behavior based on attenuated consequences: “[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”²⁰⁹ Research has reinforced these conclusions as to both general and specific deterrence of juveniles.²¹⁰

2. *Cooperation (or Coercion?)*. One of the most commonly stated justifications for punishing prostituted girls is to secure their cooperation against pimps and customers.²¹¹ Although no statute incorporates this justification, it is widely cited by prosecutors and law enforcement. For instance, Las Vegas police “routine[ly] use” material witness holds to detain prostituted girls, often for weeks, so that they can assist in prosecuting their pimps.²¹² Similarly, New York City prosecutors opposed the decriminalization of juvenile prostitution, arguing that they needed the threat of prosecution and jail to ensure girls’ cooperation.²¹³

Cooperators are sometimes detained pending the target’s trial to ensure their testimony. This is almost always true in prostitution cases, where girls are flight risks due to their runaway histories, and are often reluctant to testify against their pimps because of love or fear. Cooperation is a widely accepted use of the criminal law, but has been criticized, particularly when coercive tactics are used against vulnerable

208. HAW. REV. STAT. § 712-1200 cmt. (West 2013) (“Venereal disease is not prevented by laws attempting to suppress prostitution.”). The Model Penal Code drafters also noted the disputed nature of empirical claims against harm prevention in the prostitution context. MODEL PENAL CODE § 251.2, cmt. 1 (1980).

209. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

210. See generally OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE (Barry C. Feld & Donna M. Bishop eds., 2012) (collecting studies).

211. See, e.g., Abigail Goldman, *What Should Clark County Do with Juvenile Prostitutes?*, LAS VEGAS SUN (Mar. 22, 2010), <http://lasvegassun.com/news/2010/mar/22/what-should-clark-county-do-teenage-prostitutes/> (reporting on a fourteen-year-old girl kept in juvenile detention for thirty-eight days to secure her testimony against her pimp); see also Birkhead, *supra* note 23, at 1083–84 (listing this as a common rationale offered by prosecutors around the country for jailing or prosecuting prostituted girls).

212. Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 471, 495–96 (2008).

213. Bob Herbert, Op-Ed., *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008, at A25.

populations.²¹⁴ Using coercion to secure cooperation is particularly controversial when the cooperator is either a nonoffending witness or a victim. Accordingly, most material witness statutes are narrowly drawn or interpreted to, for instance, allow detention only of witnesses who explicitly and willfully refuse to promise to appear,²¹⁵ or to prohibit detention of witnesses “on the mere suspicion that they know something[.]”²¹⁶ or where the prosecution is local.²¹⁷ Often witnesses must be detained in nonjail settings.²¹⁸

Recognizing the ineffectiveness and potential illegitimacy of detaining witnesses who are also victims, prosecutors in numerous jurisdictions prohibit or advise against using material witness holds in domestic violence cases.²¹⁹ In Michigan, for instance, the Prosecuting Attorneys Association warns prosecutors not to seek an arrest warrant or other sanctions against victims who refuse to testify: “The obvious answer [to these tactics] is a resounding ‘No!’ All of these responses only re-victimize her.”²²⁰ The manual explains that a victim’s refusal to testify may be a rational response for her safety, and aggressive tactics can backfire if the victim recants or minimizes the harm done to her.²²¹ Other prosecutors’ offices have recognized that compelling victims to testify through sanctions can lead to the use of such sanctions by the abuser to manipulate the victim, and a systemic dissuasion of victims from seeking assistance in the future.²²²

214. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 672–77, 683–96 (2004).

215. See 18 U.S.C. § 3144 (2012); ARK. CODE ANN. §§ 16-85-507 to -508 (2013).

216. Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America’s Material Witness Laws*, 42 GA. L. REV. 941, 948 (2008) (quoting *State v. Price*, 260 A.2d 877, 882 (N.J. Super. Ct. Law Div. 1970)).

217. N.Y. CRIM. PROC. LAW §§ 620.10 cmt., 620.20 (McKinney 2015) (“Practice Commentaries” by Peter Preiser).

218. See, e.g., OKLA. STAT. ANN. tit. 22, § 719 (West 2014).

219. Courts have also recognized some of the unique concerns of victim-witnesses in domestic violence cases. See, e.g., *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at *15 (N.Y. Sup. Ct. Apr. 7, 2003) (“Attempts to hold complainants in contempt as a means of compelling their testimony are notably unsuccessful and serve only to abuse the complainants further.”).

220. HERB TANNER, JR., PROSECUTING ATTORNEYS ASS’N OF MICH., DOMESTIC VIOLENCE TRIAL MANUAL 108 (2009 ed. 2009), available at <http://www.michiganprosecutor.org/Downloads/Domestic%20Violence/Domestic%20Violence%20Trial%20Manual%202009%20Edition.pdf>.

221. *Id.*

222. IOWA ATTORNEY GENERALS OFFICE PROCEDURES AND POLICIES FOR PROSECUTION OF DOMESTIC ABUSE CASES: IOWA CODE § 13.2(14) (2007), at 4, available at <http://iowa-icaa.com/wp-content/uploads/2014/09/AG-Domestic-Abuse-Policy-ICAA-Website.pdf> (last modified Sept. 25, 2014).

Anti-trafficking laws also mandate that victims should not be jailed or otherwise punished for failure to cooperate. For instance, the TVPA does not permit the detention of adult trafficking victims who refuse to cooperate and exempts trafficked minors from having to cooperate to access services and immigration amnesty.²²³ On the contrary, prosecutors must ensure that prostituted/trafficked children shall “(A) not be detained in facilities inappropriate to their status as crime victims; (B) receive necessary medical care and other assistance; and (C) be provided protection if a victim’s safety is at risk or if there is danger of additional harm by recapture of the victim by a trafficker.”²²⁴

These considerations similarly render punishment to compel cooperation ineffective and illegitimate in the context of juvenile prostitution. The prosecutions are almost always local, yet the girls are placed in jail. The same safety and relationship considerations present in domestic violence cases apply to many prostituted girls.²²⁵ Indeed, these pressures are likely heightened because prostituted girls are young and often completely dependent upon their pimps for housing and safety.²²⁶ A rational cost-benefit analysis leads many girls to return to their pimps, rather than risk violence or homelessness. As one former prosecutor noted, however, these risks are sometimes ignored:

There’s an inherent conflict . . . between [the children’s advocates and the police and prosecutors] because the advocates want the kids . . . to get out of the life, but they don’t want them to cooperate . . . against the pimps because they fear for the kids’ safety and rightly so. On the law enforcement side, . . . they want these kids to cooperate and be witnesses. They may not be as concerned about their safety as the advocates are.²²⁷

223. 22 U.S.C. §§ 7102, 7105 (2012).

224. *Id.* § 7105(c)(1).

225. See, e.g., LLOYD, *supra* note 20, at 137 (outlining the risks girls may incur if they cooperate against their pimps).

226. See William A. Scarborough, *Legislative Initiatives in New York State*, CHILD POLY F. N.Y., Summer 2009, at 22, 24–25, available at http://www.brooklyn.cuny.edu/web/aca_centers_children/090206_CPFNY_Proceedings.pdf (explaining that prostituted girls are often reluctant to testify against their pimps because the pimps are also their landlords, leaving these girls “virtually nowhere to go”).

227. *Changing Perceptions: A Conversation on Prostitution Diversion with Judge Fernando Camacho*, CENTER FOR CT. INNOVATION (Jan. 2012), <http://www.courtinnovation.org/research/changing-perceptions-conversation-prostitution-diversion-judge-fernando-camacho-0>. As in domestic violence cases, prosecutors can still bring cases using other types of evidence rather than relying only on cooperating witnesses. See, e.g., Memorandum on N.Y. Bill A02240 (2013) (amending the criminal procedure law to allow

C. Paternalism

The protection of girls from the harms of prostitution is the strongest, and now the most commonly used, rationale offered for their punishment, but it also fails. No statutes explicitly justify criminalizing prostitution to protect the prostitutes themselves, but numerous police, prosecutors, and courts have offered this rationale in the context of juvenile prostitution.²²⁸ Typical is the Las Vegas chief juvenile prosecutor who explicitly acknowledged the self-victimization driving the prosecution model. Child prostitutes, he said, “clearly [present] a danger to themselves [rather than to the community]. Physical assault, beatings, sexual abuse, venereal diseases, pregnancy, psychological damage—the risks are tremendous.”²²⁹ Similarly, an FBI agent acknowledged that “[jailing] some kids may be the best option to protect them, although it falls far short of ideal.”²³⁰

Legal paternalism is the restriction of a person’s autonomy or choice solely to benefit that person or reduce harm to him.²³¹ Liberals have historically opposed legal paternalism, no matter what the level of potential self-harm.²³² As John Stuart Mill wrote: “[A man] cannot be rightfully compelled to do or forbear because it will be better for him to do so”²³³ In more recent times, however, some paternalistic measures have been widely accepted, such as mandatory seat belt laws. This reflects the view of contemporary philosophers, such as Gerald Dworkin, that some paternalism is justified, but that its use should be limited.²³⁴

for additional investigatory tools to investigate exploitation and trafficking). Federal prosecutors have successfully prosecuted domestic trafficking cases using wiretap evidence and not using witnesses, although they acknowledge the greater resources they have. Telephone Interview with former prosecutor (Jan. 6, 2014).

228. At least one court has considered a rationale of protecting women, although not explicitly focusing on minors. See *Cherry v. Koch*, 491 N.Y.S.2d 934, 944 (Sup. Ct. 1985) (“[C]ommercial sex demeans and exploits women, particularly the young and uneducated who require protection of their interests.”).

229. LYNCH & WIDNER, *supra* note 72, at 36.

230. Davis, *supra* note 11.

231. Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/paternalism/> (last updated June 4, 2014).

232. See, e.g., Douglas N. Husak, *Legal Paternalism*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 387, 394 (Hugh LaFollette ed., 2003).

233. 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 3 (1986) (quoting JOHN STUART MILL, ON LIBERTY 18–19 (2009)). Kantians have also traditionally opposed paternalism, on the grounds that infringements on autonomy treat people as “simply means to their own good, rather than as ends in themselves.” Dworkin, *supra* note 231.

234. See Gerald Dworkin, *Paternalism*, in PHILOSOPHY OF LAW 230, 239 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980). For instance, most theorists would limit

As evidenced by its name, legal paternalism has been most vigorously applied to minors.²³⁵ Joel Feinberg has outlined how, in recent decades, paternalism has prompted the zealous prosecution of those exploiting children and other “helpless or vulnerable people.”²³⁶ Lack of consent is a key component of this type of paternalism, since if a person is coerced into consent, or is incapable of consenting due to her age, paternalism is not interfering with that person’s liberty in preventing self-harm. Rather, it is preventing harm by others.²³⁷

While most philosophers have accepted the necessity for some level of paternalism, few support punitive paternalism. This would be akin to punishing the victim and thus “is never a morally valid reason for statutes threatening the nonvoluntary self-endangerer *himself* with criminal punishment.”²³⁸ Specifically in the juvenile context, Gordon Hawkins and Franklin Zimring have concluded that “[i]t is never appropriate to use either the criminal law or the delinquency jurisdiction of the juvenile court to punish minors severely solely because they put themselves at risk.”²³⁹

Indeed, punitive paternalism is an oxymoron. As Douglas Husak points out, punishment undermines the very aim of paternalism, the prevention of self-harm, as punishment “is almost always more detrimental to an offender’s ability to make his own life than is the harm that he risks to himself by engaging in the proscribed conduct.”²⁴⁰ Severe sanctions thus signal that a law is not truly paternalistic, i.e. not really intended to benefit the sanctioned parties, but is instead perhaps “an expression of moral abhorrence,” for “[p]arents, after all, do not imprison or hang their children for their own good.”²⁴¹

Reflecting this view, most scholars do not support criminally sanctioning even adult prostitutes themselves as an effective or morally correct method of reducing this harm.²⁴² One state

intervention to physical and psychological, rather than moral, harms. Husak, *supra* note 232, at 409.

235. See, e.g., Dworkin, *supra* note 234, at 235.

236. 3 FEINBERG, *supra* note 233, at 5.

237. *Id.* at 13.

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

239. Gordon Hawkins & Franklin E. Zimring, *Pornography and Child Protection*, in CRIMINAL LAW AND THE REGULATION OF VICE, *supra* note 67, at 609, 628.

240. Husak, *supra* note 232, at 405.

241. 3 FEINBERG, *supra* note 233, at 18.

242. See Stuart P. Green, *Foreword: Symposium on Vice and the Criminal Law*, 7 CRIM. L. & PHIL. 3, 7–9 (2013), available at <http://link.springer.com/article/10.1007/s11572-012-9178-5/fulltext.html>. A few, however, justify punishing prostitutes on

legislature also explicitly rejected this rationale as not supporting the broad reach of current anti-prostitution sanctions: "If [protection of innocent girls from] exploitation were a significant [basis for criminalizing prostitution], the offense could be dealt with solely in terms of [statutes criminalizing] coercion."²⁴³ Not only is self-protection deemed to be an insufficient basis for sanctions generally, but the harms of criminalization in this context are far worse, both for the girls themselves and for society as a whole.²⁴⁴ If the goal is protection, why have law enforcement served as the gateway and incarceration as the default service?²⁴⁵ This structure, coupled with the lack of preventive or rehabilitative services for prostituted girls in the juvenile justice system, suggests that "protection" is really punishment by another name.²⁴⁶

IV. ACTUAL EXPLANATION FOR PUNISHMENT: LEGAL MORALISM

As the three theories described above do not explain the punishment of prostituted girls, what does? The most convincing explanation for the paradox of girlhood sex is legal moralism or its more modern iteration, social control.²⁴⁷ Girls who are sexually active, even when their activity harms only themselves, are so contrary to established norms that their protection takes a harsh and stigmatizing form.²⁴⁸ A former head juvenile justice administrator revealed this truth underlying the rhetoric of protection: "[W]e have had a strong heritage of being protective

paternalistic grounds, i.e. to prevent self-harm. *See, e.g.*, Dempsey, *supra* note 38, at 66–67 (reviewing Peter de Marneffe's "paternalistic case" for criminalizing prostitution).

243. *See* HAW. REV. STAT. § 712-1200 cmt. (West 2013).

244. *See* Green, *supra* note 242, at 12; Stuart P. Green, *Vice Crimes and Preventive Justice*, CRIM. L. & PHIL. (Oct. 10, 2013), <http://link.springer.com/article/10.1007/s11572-013-9260-7>.

245. Further belying a truly protectionist purpose is the refusal of courts, police, and prosecutors to apply statutory rape or child abuse laws to protect prostituted girls and sanction their exploiters. *See* Petition for Writ of Certiorari, *supra* note 101, at 2–4.

246. In determining whether a measure is punitive, courts should ascertain "whether an alternative purpose to which it may rationally be connected is assignable for it." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

247. Legal moralism is the punishment of harmless acts deemed "immoral." 4 FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988), *supra* note 233, at 324. Social control is "a normative system with rules about the way people should and should not behave, and a system of formal and informal mechanisms used to control deviation from, and promote conformity to, these rules." RONALD L. AKERS, *CRIMINOLOGICAL THEORIES* 165 (3d ed. 2000).

248. This rationale is not usually explicitly stated, although some continue to decry the "immorality" of prostituted children. *See supra* notes 15–17 and accompanying text. Nonetheless, it persists in more opaque ways, in the manner in which we differentiate these girls from other victims. *Supra* notes 15–17 and accompanying text.

towards females in this country...[and it is against] our sensibility and values to have a fourteen-year-old girl engage in sexually promiscuous activity...[I]t's not the way we like to think about females in this country."²⁴⁹ The continuing widespread arrest, prosecution and incarceration of girls for self-victimization, such as being sold for sex, reflects the entrenchment of this viewpoint.

After briefly outlining the theoretical framework of social control via criminalization, this Part delineates the robust historic use of the criminal law to regulate adolescent female sexuality. It then turns to the current treatment of prostituted girls. Their punishment, despite their victimhood and the ineffectiveness of criminal sanctions at protecting them, is a continuation of this historic regulation rather than retribution for violating the law or a genuine systemic effort at protecting them from exploitation.²⁵⁰

A. "Teach the Children Well"

1. *Social Control via Criminalization.* Some degree of social control is a natural and necessary function of the criminal law.²⁵¹ Its overuse, however, raises serious concerns. One concern is the criminalization of marginal or nonconforming populations. As Michel Foucault observed in his seminal work, *Discipline and Punish*, disciplinary regimes transform nonmainstream behavior into disease or offense.²⁵² The state thus uses crime control "to legitimate interventions that have other motivations," such as the exclusion of racial minorities and low-income people.²⁵³ This concern is amplified when the conduct at issue, like sex, is of contested wrongfulness or closely connected to morality. While some categories of crimes such as murder and theft are widely

249. MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 175 (3d ed. 2004) (emphasis added) (quoting the director of the National Center of Juvenile Justice in 1975) (internal quotation marks omitted).

250. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("preservation-through-transformation" (quoting Siegel, *supra* note 16, at 2180)).

251. But see 4 FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988), *supra* note 233, at 324 (concluding that legal moralism is justified only in "extraordinary circumstances").

252. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977).

253. JONATHAN SIMON, *GOVERNING THROUGH CRIME* 4 (2007). Scholars have developed a robust literature in recent years describing the use of criminal sanctions, or the threat thereof, to control poor and marginalized communities. See, e.g., ALEXANDER, *supra* note 25, at 22; GARLAND, *supra* note 157, at 200.

agreed-upon wrongs, the same is not true of vice crimes such as prostitution.²⁵⁴ Normative sexual behaviors, particularly of young girls, are hotly contested and thus particularly susceptible to being defined by culturally specific values. Punishing marginalized communities for behavior of contested wrongfulness can quickly elide into the punishment of even harmless nonconformity.

A second, related, concern is the use of very punitive sanctions for social control purposes. Scholars across numerous fields have persuasively outlined the increasing severity in criminal justice since the 1970s, even as crime has declined.²⁵⁵ This punitive upsurge has resulted in the demise of a rehabilitative approach to juveniles, harsh sanctions for low-level offenses, and the growing popularity of criminal sanctions and incarceration as solutions to virtually any social problem, be it family violence, addiction, or school discipline.²⁵⁶ Those being punished are on society's margins; the poor and racial minorities and the rhetoric used by politicians, prosecutors, and police furthers this division of society into the useful and the useless. As sociologist Loïc Wacquant puts it: "[T]his discourse openly valorizes repression and stigmatizes [groups including] youths from declining working-class neighborhoods, the jobless, homeless, beggars, drug addicts and street prostitutes."²⁵⁷

2. *Historic Training of Delinquent Daughters.*

Understanding the entrenchment of punitive paternalism as a response to prostituted minors entails looking back to early state interventions as to adolescent behavior. The first juvenile court opened in Chicago in 1899, and by 1928, there were juvenile courts in all but two states.²⁵⁸ Juvenile court was the product of numerous socioeconomic changes, including the development of childhood as a distinct life phase, extremely rapid modernization, urbanization, and immigration, and concomitant changes in family structure and social relations.²⁵⁹ Designed to rehabilitate rather than punish "wayward youth," the court was to be guided by an omniscient and benevolent judge. In order to "meld[] child welfare and crime control goals," it did not distinguish among children who were neglected or abused, those who engaged in

254. See ZIMRING & HARCOURT, *supra* note 67, at 28–29 (discussing how society agrees that certain categories of crime are wrongs, while other categories are not considered wrongs).

255. WACQUANT, *supra* note 39, at 11.

256. SIMON, *supra* note 253, at 186–88.

257. Loïc Wacquant, *Ordering Insecurity: Social Polarization and the Punitive Upsurge*, 11 RADICAL PHIL. REV. 1 (2008).

undesirable acts, such as running away from home, that were not crimes (now termed "status offenses"), and those that committed crimes (delinquents).²⁶⁰ As one of the juvenile court's earliest observers opined: "Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?"²⁶¹

This rosy picture does not, however, fully explain the court's history or its current operation.²⁶² Historians now widely agree that the juvenile court was designed in large part to regulate the low-income, often immigrant, families crowding America's rapidly expanding cities. Anthony Platt, in his seminal work *The Child Savers: The Invention of Delinquency*, argues that the juvenile court's creation represented an ambitious expansion of the state's powers of social control to shape those deemed likely to be deviant, but still young enough to potentially conform. To aid in this endeavor, early juvenile court advocates "invented . . . new categories of youthful misbehavior," allowing them to stamp out "deviant" behaviors including begging and prostitution, Americanize children, and instill in them middle-class values.²⁶³ This "moral crusade" was based in large part on the belief that punishment, including incarceration, was for children's own good, at least when the children were poor or immigrant.²⁶⁴ Accordingly, the system was set up with few, if any, legal requirements for children to be taken into state custody, and it

258. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (expanded 40th anniversary ed. 2009).

259. FELD, *supra* note 1, at 1.

260. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189, 195 (2007).

261. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

262. See Bernardine Dohrn, *Foreword* to DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* vii–ix (2004); see also MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* xxviii (2003) (noting that Chicago's juvenile court "aimed not merely to punish offenders but to assist and discipline entire urban populations"). Girls brought into juvenile court were almost exclusively working-class, and often racial and ethnic minorities. Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 71 (1978).

263. PLATT, *supra* note 258, at 3–4, 36–39.

264. *Id.* at 4, 53. Barry Feld puts it even more forcefully: "[T]he juvenile court [was] deliberately designed . . . to discriminate against 'other peoples' children" Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 331, 339 (1999) (quoting W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN* 69 (1988)).

maximized the discretion of judges and probation officers.²⁶⁵ Discretion was rarely used to release children, instead usually resulting in long or indeterminate sentences in reformatories that were far more punitive than rehabilitative.²⁶⁶

The early juvenile court system was highly gendered—indeed, an “obsession” with adolescent female sexuality drove its very creation.²⁶⁷ A nationwide “purity” campaign sought to protect and control immigrant and working-class girls exposed to “temptation” by their increasing entry into the workforce and freedom from family and community restraints.²⁶⁸ Morals police, also known as protective officers, worked with juvenile courts and reformatories to enforce sex role conformity in “immoral or wayward” girls. Accordingly, premarital sexual activity or defiance of parental and other authority brought girls into juvenile court, in contrast to the actual criminal behavior, such as theft, which brought boys into the system.²⁶⁹ The behaviors targeted, however, were much broader than sex and included any behaviors indicating perceived sexuality, including dressing “provocatively” or wearing makeup, “flirting,” staying out late, or going to dance halls unchaperoned.²⁷⁰ Girls coming into court for other reasons, such as theft or running away, underwent mandatory pelvic exams to determine if they were sexually active, tested for sexually transmitted infections, and often “relabelled” as moral offenders.²⁷¹ In this manner, virtually all of girls’ misbehavior and treatment needs were sexualized.

265. Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE 142, 142–43 (Margaret K. Rosenheim et al. eds., 2002) (“Broad and vague definitions of delinquency were favored, so that all children who needed help would fall within the new court’s jurisdiction.”).

266. See CHESNEY-LIND & SHELDEN, *supra* note 249, at 163. The Supreme Court acknowledged the punitive reality of the juvenile justice system sixty years later in *In re Gault*. *In re Gault*, 387 U.S. 1, 14–16 (1967).

267. See WILLRICH, *supra* note 262, at 209 (reporting that juvenile courts often retained jurisdiction over girls until an older age than boys).

268. Fears of “white slavery” (the Mann Act was passed in 1910) and of prostitution more generally also drove this purity campaign.

269. MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920*, at 136, 155–56 (1995) (63 percent of the girls were arrested for “sex delinquency,” usually meaning premarital sex, and 18 percent for other “moral offenses”). Similarly, a New York study of the inmates of two girls’ reformatories found that 51 of 100 of the girls were committed for either prostitution or solicitation. RUTH M. ALEXANDER, *THE “GIRL PROBLEM”: FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930*, at 30 (1995).

270. Schlossman & Wallach, *supra* note 262, at 71–73 (summarizing research from juvenile court records from Milwaukee, Chicago, San Francisco, and New Haven).

271. *Id.* at 73.

The traditional Madonna/whore binary of female sexuality underlay this framework. Girls were deemed both vulnerable and lustful, simultaneously needing protection and punishment. This dichotomy persisted although the majority of girls arrested and detained were neither "helpless" victims of statutory rape nor "troubled" prostitutes, but rather were voluntarily engaged in sexual relationships with men who were also young and working-class.²⁷² Even where women were punished for prostitution, it is not clear that they actually committed that crime because in post-Victorian America police and judges "found rebellious working girls [to be] indistinguishable from prostitutes."²⁷³ Illustrative is the story of Nellie, a young woman institutionalized after having sex with various men in a hotel. Nellie argued that she should not have been convicted of prostitution because she consented and had not been paid or exploited by her partners, but she was ignored.²⁷⁴ Nellie was punished not only because of the societal belief that any sexual exploration could easily lead to a girl's ruin and actual prostitution, but also because Nellie's attempt to breach the female binary was itself blameworthy—she had "demonstrated a disgraceful willingness to narrow the social distance between herself and the degraded prostitute."²⁷⁵ This framework transformed sexuality or assertions of independence in dress and behavior into prostitution, a violation of sexual norms into a crime.

The "whore" category swept in more than just sexually experimenting girls however; all girls deviating from middle-class standards of female virtue were conflated, including the victims of forcible or statutory rape. Demonstrating this, the treatment of girls detained as victims and as offenders was virtually indistinguishable, with acknowledged rape victims detained in reformatories pending court proceedings, subjected to pelvic exams, interrogated about their sexual histories, and blamed if they did not forcibly resist, despite their legal inability to consent.²⁷⁶ The inverse was true as well—many of the girls designated offenders displayed victim-like characteristics. For instance, 20 percent of female delinquents in one study were

272. *Id.* at 71 (reporting that the majority of the girls in their study fit this profile).

273. ALEXANDER, *supra* note 269, at 2, 4.

274. *Id.* at 12–13.

275. *Id.* at 12, 40, 42.

276. Sadly typical was one case where a judge asked a thirteen-year-old abused by her twenty-seven-year-old brother, "Why did you let him do this, . . . you knew that it was naughty, didn't you?" ODEM, *supra* note 269, at 69 (quoting Alameda County Superior Court, Oakland, Calif., Case No. 6859 (1918)).

runaways, often from abusive family situations.²⁷⁷ Men were rarely detained or punished very severely for statutory or even forcible rape, and were sometimes excused completely as driven to their actions by these young girls.²⁷⁸

Girls were severely sanctioned for their norms violations, and were punished much more severely than boys, even though boys were mostly arrested for actual crimes.²⁷⁹ Probation was deemed too risky for many girls, the temptations of nonconfinement too great, so authorities instead preferred to institutionalize girls for two to three years until they were an appropriate age for marriage.²⁸⁰ Reflecting this pattern, 26 percent of girls in the Los Angeles study received a sentence of probation versus 44 percent of boys, and 33 percent of girls were institutionalized for a period of years versus only 21 percent of boys.²⁸¹ This gender discrepancy in sentencing was reflected across the country.²⁸² Girls were also incarcerated for significantly longer periods than boys.²⁸³ This pattern increased as to morals offenses—the few boys brought in on such charges, including statutory rape, almost always received lighter punishments, perhaps just a “stern lecture.”²⁸⁴

Harsh measures were deemed necessary both for the girls themselves and for society as a whole. For a girl, a morals offense “threatens the ruin of her whole life, and the situation demands immediate action The delinquent boy, on the other hand, is frequently only a troublesome nuisance who needs discipline but who, as the probation officer so often says, is ‘*not really a bad boy*.’”²⁸⁵ For society, “[a] girl’s misstep is . . . vital to the race It is an attack upon motherhood, it is the poisoning of the sources of life, it requires more immediate, intimate and

277. *Id.* at 50, 61, 138 (noting that these girls often engaged in what is now termed “survival sex,” i.e. sex for shelter or food).

278. The historical sources are replete with such cases. Then, as now, the real harm in sexual assault was seen as the theft of a girl’s chastity, rather than the physical or mental trauma of exploitative sexual activity. *Id.* at 71, 78 (describing a defense attorney arguing for leniency for his client because the client had “not committed a crime that is as heinous as it would be if he had raped a pure girl.”) (quoting Alameda County Superior Court, Oakland, Calif., Case No. 4979 (1911)).

279. Schlossman & Wallach, *supra* note 262, at 73.

280. *Id.* at 76, 84.

281. ODEM, *supra* note 269, at 146, 156.

282. CHESNEY-LIND & SHELDEN, *supra* note 249, at 167 (noting that in Chicago, Milwaukee, and Memphis, more than twice as many girls were institutionalized as boys).

283. *Id.* (detailing data).

284. ODEM, *supra* note 269, at 156.

285. *Id.* at 115 (emphasis added). The implication of course is that the girls were really bad girls.

expert attention than bodily ailments”²⁸⁶ Girls were confined in reformatories tasked with indoctrinating them in appropriate female behavior and preparing them for marriage and motherhood.²⁸⁷ To this end, they were isolated from boys and men, trained in domestic labors and often placed as servants in private homes before they were paroled.²⁸⁸

A word regarding parents is called for. The standard narrative of the juvenile court is of state intervention into the theretofore private sphere of the family, to control children whose parents were failing to do so.²⁸⁹ But the story as to girls is more complicated. Parents frequently welcomed, even sought, help to control their daughters. This contrasted with their more laissez-faire attitude towards sons.²⁹⁰ Consistent with this pattern, researchers found that a large percentage of girls were referred to court by a parent or relative, while boys were mostly referred by law enforcement.²⁹¹ Parents almost never referred boys for sexual misconduct, in contrast to girls.²⁹² This imbalance reflects still extant gender stereotypes—boys’ youthful missteps are to be overlooked, whereas girls must behave to preserve the family honor and their own prospects for marriage.²⁹³

Today, girls are a rapidly growing group of young offenders. Between 1985 and 2010, the number of delinquency cases involving girls increased 69 percent while those involving boys increased only 5 percent.²⁹⁴ Their rates of incarceration have

286. *Id.* at 112 (quoting Editorial, *Our Juvenile Court Problem, the Delinquent Girl—Need for a Woman Judge*, 2 WOMEN LAW. J. 58, 59 (1913)) (internal quotation marks omitted).

287. See Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1586, 1590 (2012).

288. CHESNEY-LIND & SHELDEN, *supra* note 249, at 168.

289. PLATT, *supra* note 258, at 145.

290. CHESNEY-LIND & SHELDEN, *supra* note 249, at 36–37.

291. ODEM, *supra* note 269, at 135 (47 percent). Alexander’s sample dealt with slightly older girls, but still found that a significant number were incarcerated upon parental request. ALEXANDER, *supra* note 269, at 150.

292. Sixty percent of parents’ complaints about girls centered on sexual misconduct versus only eight percent of those about boys. ODEM, *supra* note 269, at 176–78. The few boys reported by their parents for sexual misconduct were accused of molesting younger siblings or “homosexuality.” *Id.* at 178.

293. Statutory rape doctrine is also gendered and based on the same stereotypes about boys and girls. See *supra* notes 53–55 and accompanying text. Although problematic in its own right, my argument here is against the criminalization of girls under the guise of protection, rather than against their protection in other forms. Thus, I do not address the problems with statutory rape laws which are hardly ever used to punish girls.

294. See CHARLES PUZZANCHERA & SARAH HOCKENBERRY, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2010, at 11–12 (2013), available at <http://www.ncjj.org/pdf/jcsreports/jcs2010.pdf>.

increased dramatically, particularly as compared to boys.²⁹⁵ Yet their pathways into and treatment in the system continue to be very different than boys, with the overwhelming majority of girls continuing to be arrested and incarcerated for nonviolent offenses.²⁹⁶ As criminologist Meda Chesney-Lind describes it, girls adjudicated delinquent violate female role expectations more frequently than criminal law statutes.²⁹⁷

B. Policing the Boundaries of Victimhood and Girlhood

As it did historically, the criminal law continues to act as a powerful mechanism to control girls' behavior, particularly their sexual behavior. Situated at the intersection of two statuses, girls are victims if viewed one way, offenders if viewed another.²⁹⁸ This designation has great significance beyond the expressive—the pathway upon which a girl is placed brings sympathy or stigma, services or punishment.²⁹⁹

Prostituted children are particularly far from normative visions of girlhood. As a result, they continue to be designated as offenders.³⁰⁰ Kim Taylor-Thompson explains that “[w]e reserve our harshest judgment for girls who stray from the feminine ideal and whom we can, thereafter, censure for failing to live up to our expectations.”³⁰¹ This is true regardless of their actual vulnerability and need for protection.³⁰² Indeed, this duality of

295. LIZ WATSON & PETER EDELMAN, IMPROVING THE JUVENILE JUSTICE SYSTEM FOR GIRLS: LESSONS FROM THE STATES 1, 3 (2012), available at http://www.law.georgetow.n.edu/academics/centers-institutes/poverty-inequality/upload/JDS_V1R4_Web_Singles.pdf (between 1991 and 2003, girls' rates of incarceration rose by 88–98 percent while boys' detention rate increased by 23–29 percent).

296. OJJDP 2006 REPORT, *supra* note 119, at 210.

297. See CHESNEY-LIND & SHELDEN, *supra* note 249, at 51–52.

298. Juvenile prostitution is one of several crimes as to which police have tremendous discretion to designate people victims or offenders for the same conduct, often based on irrational or biased criteria. I plan to further address this victim/offender overlap in future work.

299. Norms and roles express societal views about acceptable behaviors and create the social meaning of conduct. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951, 956 (1995). Because the archetypal victim in our society is female and/or a child, the girlhood role and norms are inextricably intertwined with the victim role and norms.

300. See Kessler, *supra* note 10, at 153. The tendency to see nonconforming girls as offenders is so powerful that even the minority of criminal justice actors who now see them as victims, and work with them, relate how at first they viewed them as offenders. See, e.g., *id.* at 214 (For instance, one judge who now sees the girls as victims relates how for many years she “viewed them as willing participants” and “lecture[d] them about bad choices.”).

301. Taylor-Thomson, *supra* note 126, at 1138–39.

302. *Id.*

offender versus victim is so deeply embedded that many prostituted girls do not even see themselves as victims.³⁰³ The flip side of this framework is that customers of prostituted minors are not prosecuted for statutory rape. Since the girls are offenders, hence ineligible as victims, their exploiters escape punishment.

Tellingly, incarceration is the most commonly used intervention to “help” prostituted girls.³⁰⁴ The only comprehensive study of case outcomes in one urban jurisdiction found that 62 percent of prostituted children aged fifteen and younger were incarcerated.³⁰⁵ Many jurisdictions routinely impose weeks-long “protective” confinement on minors arrested for prostitution.³⁰⁶ Typical is the police officer from Seattle who acknowledged that he and his colleagues “will often select jail because we know they won’t be allowed to walk out the door.”³⁰⁷ As is the Atlanta judge who “put[s] girls in [jail] until [she] could figure out where else to put them.”³⁰⁸ Yet authorities also may justify jailing girls by denying them victim status. As one law enforcement officer said about jailing a teenager after her “rescue” from her pimp: “Can we treat her as a 100 percent victim right now? I can’t say that until an investigation is done.”³⁰⁹ In another case, a prosecutor argued that a prostituted twelve-year-old merited incarceration because she “lacked remorse [and] . . . need[ed] the structured situation which [would] . . . force [her] to face up to where [she was] in [her] li[fe] and what [she] ha[d] done.”³¹⁰ Although incarceration is often explained as necessary to ensure that girls cooperate with

303. Patricia Leigh Brown, *An All-Hands Approach Aids Girls Most at Risk*, N.Y. TIMES, Jan. 29, 2014, at A11 (quoting an Alameda County judge: “Many girls come to court unaware that they are being exploited.”).

304. This includes incarceration pre-trial and post-adjudication. *See, e.g., In re Bobby P.*, 907 N.Y.S.2d 540, 547–49 (Fam. Ct. 2010) (finding that a fifteen-year-old girl’s “self-destructive and dangerous behavior” in running away from foster care and being prostituted merited a delinquency charge so that she could receive services in confinement). Incarceration is also used as leverage for girls’ cooperation against their pimps. *See* NRC, *supra* note 7, at 202.

305. MUSLIM, LABRIOLA & REMPEL, *supra* note 8, at 17 (studying New York City, although some unknown percentages were in nonsecure facilities); *see also* NRC, *supra* note 7, at 188 (national study finding that “[s]ecure detention often is used as a means of ‘protecting’ [exploited minors]”).

306. *See, e.g., Powers, supra* note 181 (minors arrested for prostitution in Las Vegas are usually jailed for at least two weeks).

307. Sullivan, *supra* note 182.

308. Hansen, *supra* note 31.

309. Davis, *supra* note 11 (quoting a Pennsylvania official).

310. Leslie Kaufman, *Determining the Future of a Girl with a Past*, N.Y. TIMES, Sept. 15, 2004, at B1.

services or with the prosecution, and are housed away from their pimps, the reality is that there are few to no services in detention or jail for girls generally, nor for prostituted girls in particular.³¹¹

Despite being framed as necessary to protect girls from the harms attendant to prostitution, interventions are invariably punitive. Consider these cases. A prosecutor reports that a teenage girl is engaged “in extremely high-risk behavior” and expresses “a lot of concern for her personal safety.”³¹² To what end? A request of the extremely disproportionate sentence of one year’s incarceration for prostitution.³¹³ Similarly, a juvenile court judge expressed “frustration [and] profound sadness” at *not* being permitted to detain a thirteen-year-old girl who was arrested for a violation, loitering for the purpose of engaging in prostitution, rather than for a crime: “In an age of deadly sexually transmitted diseases, this places young persons who are highly vulnerable, and most needful of protection, outside the authority of the juvenile justice system to aid them.”³¹⁴ Positing incarceration as aid, the judge called on legislators to change the state law so that courts could in the future, “confine [girls like] her as an action consistent with [their] *best interests*.”³¹⁵

Even where punishment is purportedly for other reasons, such as community protection from harm, a closer look reveals that this justification is actually cover for punitive paternalism.³¹⁶ Evidencing this, a Washington court sentenced a girl to twenty-six weeks of incarceration per count of prostitution, a sentence so unusually harsh that the prosecutor had to file a manifest injustice motion.³¹⁷ The court paid “lip

311. See NRC, *supra* note 7, at 202; see also WATSON & EDELMAN, *supra* note 295, at 1 (observing that the large increase in girls’ institutionalization in the last decade “signal[s] the lack of appropriate community-based alternatives to detention and residential facilities for girls”).

312. Spangenthal-Lee, *supra* note 135. Average sentences for prostitution range from fines or community service, to a few days’ incarceration.

313. *Id.*

314. *In re C.S.*, 591 N.Y.S.2d 691, 692–93 (Fam. Ct. 1992).

315. *Id.* at 693. (emphasis added); see also *Alameda County Grapples with Best Way to Rescue Teen Prostitutes*, CBS S.F. BAY AREA (Aug. 11, 2011, 10:12 AM), <http://sanfrancisco.cbslocal.com/2011/08/11/alameda-county-grapples-with-best-way-to-rescue-teen-prostitutes/> (quoting a police department spokesperson justifying incarceration because “[a] prostituted girl’s] physical safety has to be first”).

316. A harm-prevention justification is not often made in the prostitution context given that, as one court recently recognized, the harm to the girl’s welfare far outweighs the societal harm, and attributing the collateral harms of prostitution to a community to one teenaged girl “would surely be an exaggeration.” *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402, at *5–6 (N.Y. Crim. Ct. Dec. 16, 2011).

317. *State v. N.E.*, 854 P.2d 672, 672–74 (Wash. Ct. App. 1993) (per curiam). These motions are usually reserved for juveniles who commit particularly heinous crimes such

service" to community endangerment as one of the only permissible grounds for such an extreme sentence, but focused in its opinion only on the risk the girl posed to herself, not a permissible ground.³¹⁸ The opinion outlines the girl's sad history, including sexual abuse by her father and brother, repeated running away, substance abuse and untreated mental illness, and a high risk of AIDS. It also notes the lack of effective services for this traumatized girl: "We have pretty much exhausted all the services available in the community. . . . [The probation officer] is convinced that [the girl] will either end up dead or will die from her disease if something isn't done."³¹⁹ Danger to the community is thus used as a proxy for danger to the girl herself, permitting criminal sanctions normally not allowed for self-protection. And rather than question the lack of services and the incarceration of a victimized minor, the decision leaves intact the punitive approach.

The risks facing these girls are the same as those underlying statutory rape laws and other protectionist legislation—exploitation by older men, coercive sex, physical abuse, sexually transmitted infections, and unwanted pregnancy.³²⁰ Indeed, the risks are heightened for this group of girls given the multiple partners and physical and emotional trauma characteristic of prostitution. Yet their nonconformity from the victim/girl role transforms protection into punishment. This social control framework helps to explain some puzzling truths from the data outlined in Part II: First, the fact that the more needs a girl presents with, the more likely she is to be seen as an offender rather than as a victim.³²¹ A girl's sexual acting out and disobedience becomes the focus, rather than the sexual abuse or lack of treatment which led to this conduct. Second, the persistence of this punitive model despite its proven ineffectiveness.³²² The model reflects the deeply entrenched

as murder. *See, e.g.*, *State v. S.R.*, No. 51066-5-I, 2003 WL 21500727, at *1, *3 (Wash. Ct. App. June 30, 2003) (per curiam).

318. *N.E.*, 854 P.2d at 674.

319. *Id.* at 673 (internal quotation marks omitted).

320. *See supra* notes 48–52 and accompanying text.

321. One illustration of this dynamic is the fact that the younger a prostituted girl is, the more likely she is to be incarcerated. MUSLIM, LABRIOLA & REMPEL, *supra* note 8, at 15–18. Indeed, our refusal to acknowledge that children as young as ten and eleven are prostituted is reflected in the lack of services for this group and even teens up to age seventeen. *See, e.g.*, Kaufman, *supra* note 310 (documenting the lack of specialized housing in New York City for prostituted girls under seventeen years old).

322. *See supra* notes 312–19 and accompanying text (discussing the punitive nature of the treatment of prostituted girls).

perception that exploited youth are “bad kids,” responsible for their own victimization.³²³

Two norms of behavior are central to “good” girl and victim roles—chastity, and obedience to parental and state authority.³²⁴ The criminal justice system expounds these norms on both a systemic and individual level. Prostitution statutes lacking age exceptions and malleable status offenses operate systemically. On an individual level, police, prosecutors, and judges classify girls based upon their sexual behavior and deference to authority. These norms are particularly robust in the context of prostitution because criminal system actors have great discretion in arrests, charges, and sentences, which they lack as to more severe crimes. As a result, minors are subject to designation as a victim or as an offender largely at their discretion.³²⁵ In this manner, the criminal justice system does not just reflect the sexual double standard, but actually amplifies it.³²⁶

1. *Chastity.* Chastity has historically been and continues to be the thickest girlhood norm. The law has regulated this norm in numerous ways, but I focus here on statutory rape and prostitution laws.³²⁷ Statutory rape laws have changed over time to reflect views of appropriate sexuality, for instance through raising the age of consent or expanding the law’s reach to include nonvirgins.³²⁸ The victim’s “promiscuity” was a defense in all states until fairly recently, and the Model Penal Code still includes it as a defense to most statutory rape charges.³²⁹ Even

323. NRC, *supra* note 7, at 186 (reporting this problem “was repeatedly identified by service providers and other experts” around the country).

324. Obedience includes gratitude at being rescued. These two values are related; girls are frequently perceived to be disobedient about sexual issues.

325. See, e.g., Halter, *supra* note 17, at 152 (summarizing research finding that “police officers in the U.S. are inconsistent in their treatment of youth involved in prostitution”).

326. The typical prostituted minor is far more likely to be low-income and a person of color than the typical victim in a statutory rape case, so these stock designations of victim and offender tend to also reinforce race and class norms.

327. Other instances include punishment of girls for “sexting,” and the failure to convict even forcible rapes of minors deemed to be “asking for it.” Girls’ sexual activity is also regulated through status offenses. Liz Watson & Peter Edelman, *Improving the Juvenile Justice System for Girls: Lessons from the States*, 20 GEO. J. ON POVERTY L. & POL’Y 215, 217 (2013); see also Godsoe, *supra* note 16, at 1102–05 (detailing the use of the status offense system to control and punish girls who sexually act out). State surveillance of girls outside the criminal justice system also heavily focuses on their sexual activity. *Id.* at 1110–11.

328. See *supra* notes 48–60 (discussing the evolution of statutory rape laws).

329. See, e.g., MISS. CODE ANN. § 97-5-21 (repealed 1998); see also MODEL PENAL CODE § 213.6 (1985) (“(3) Sexually Promiscuous Complainants. It is a defense . . . for the [defendant] to prove . . . that the alleged victim had, prior to the time of the offense

now, after its abolition, girls' past sexual behavior creeps into decisions about whether to prosecute or convict, and how to sentence.³³⁰

Statutory rape has always been characterized by sporadic enforcement due to underreporting, proof problems, and the disputed nature of its blameworthiness. This problem has been compounded by police, judges, and others who continue to distinguish between girls whose own actions are deemed to have contributed to their rapes, and those whose purity renders them perfect victims.³³¹ Quite typical is this characterization by a judge of a statutory rape case with a twenty-nine-year-old defendant and a fifteen-year-old victim, which included indicia of forcible rape.³³² He first criticized the victim, finding "a problem . . . [where] a 15-year-old [girl] would do this kind of thing . . . [which] can subject [her] to criminal acts," and then bemoaned the larger picture of "teen-age sexual activity . . . [concluding that] '[w]e're now raising a generation of people who mate like people in heat. . . . They don't have a date, they don't have an introduction.'"³³³ A more

charged, engaged promiscuously in sexual relations with others."). Typical of the rationale underlying the widespread use of the promiscuity defense is this reasoning from one court: "While the [statutory rape of a thirteen-year-old] is revolting and reprehensible under any circumstances, it might be considered less so if the girl involved was not an innocent child, but rather one who was sexually wise and experienced far beyond her years." *Bryant v. Peyton*, 270 F. Supp. 353, 359–60 (W.D. Va. 1967) (quoting *Whitaker v. Warden*, 362 F.2d 838, 840 (4th Cir. 1966)).

330. *State v. Stiffler*, 763 P.2d 308, 311 (Idaho Ct. App. 1988) ("Though a female adolescent's precociousness may be irrelevant to the charge of statutory rape, we believe such circumstances may properly be considered in imposing punishment."); *State v. Rush*, 942 P.2d 55, 56 (Kan. Ct. App. 1997) (sentencing an adult statutory rape defendant below the statutory guidelines where, in the judge's words, "[the under fourteen-year-old] victim was . . . sexually experienced" (alteration in original)).

331. See *Levine*, *supra* note 50, at 706 (noting that prosecutors charge statutory rape defendants with lesser crimes when they perceive the victims as unsympathetic to jurors); see also *Goodwin*, *supra* note 127, at 483 (outlining how statutory rape enforcement relies on and reinforces gender stereotypes about adolescents).

332. Norris P. West, *Judge's Comments on Statutory Rape Criticized, Howard County Jurist Denies Blaming Teen Victim*, BALT. SUN (Jan. 28, 1996), http://articles.baltimoresun.com/1996-01-28/news/1996028057_1_sexual-assault-judge-girl. A more recent example is the Montana judge who, in 2013, sentenced a fifty-four-year-old man to only thirty days in prison for the statutory rape of his fourteen-year-old student—a sentence far below the mandatory minimum. The victim committed suicide after the abuse. At the sentencing hearing, the judge made derogatory statements about the victim, including holding her in part responsible for the relationship. John Bacon, *Judge Apologizes for Teen Rape Remarks, Not Sentence*, USA TODAY (Sept. 6, 2013, 4:22 PM), <http://www.usatoday.com/story/news/nation/2013/08/28/teacher-rape-montana/2722817/>. The sentence was eventually overturned and he received a sentence within the guidelines of ten years.

333. West, *supra* note 332. Girls who enter sexual relationships with adult male celebrities seem to be automatically deemed unchaste, and the adults, excused. A few examples of this are Rob Lowe, who had sex with a sixteen-year-old, and Don Johnson,

seemingly chaste victim was treated with much greater sympathy. This girl, also fifteen, was from an affluent suburban community rather than inner-city Baltimore like the prior victim. She had sex with a thirty-two-year-old man whom she met at an equestrian center. The girl's parents hired a private investigator, who uncovered the relationship, and the man was prosecuted for statutory rape. When the victim, now eighteen years old, married him and refused to testify in the prosecution based on spousal privilege, the investigating police detective was nonjudgmental, acknowledging that "the girl was naïve and in love."³³⁴

As archetypal unchaste girls, prostituted children are deemed unworthy of the protection of statutory rape and other laws.³³⁵ Quite simply, as one former prosecutor explained: "People do not see victims; they see bad girls."³³⁶ Even contemporary prosecutions are sometimes explicitly aimed at imposing sexual mores. One judge made this clear in sentencing a twelve-year-old prostituted runaway to a year in prison to learn "moral principles."³³⁷ Similarly, the recent head of the national juvenile justice office of the DOJ opined that "[t]he fact that [juvenile prostitution] remains illegal serves as a warning for everybody, including the teenagers, that they are doing something that's wrong."³³⁸

Focusing blame on the girls for their own harm also obscures the coercion and exploitation by customers and pimps.³³⁹ As one prosecutor explained in pursuing a

who lived with fourteen-year-old Melanie Griffith, claiming "she pursued me." In neither case were criminal charges brought. See *Celebrity Arrests They Wish They Could Forget*, CBS NEWS, <http://www.cbsnews.com/pictures/celebrity-arrests-they-wish-they-could-forget/3/> (last visited Apr. 18, 2015); see also *Celebrities Accused/Convicted of Statutory Rape*, AGE OF CONSENT, <http://www.ageofconsent.com/comments/numberthirtynine.htm> (last visited Apr. 18, 2015).

334. Joseph Serna & Jack Leonard, *Marriage Adds Hurdles to Pursuit of Rape Case*, L.A. TIMES, Apr. 23, 2011, at AA1.

335. Even the means used to identify girls suspected of prostitution reveal the stigma against sexually active girls. See, e.g., *In re J.J.*, No. A125054, 2009 WL 4881911, at *3 (Cal. Ct. App. Dec. 17, 2009) (stating the arresting officer asked the girl "why she would carry condoms if she was not working as a prostitute").

336. Telephone Interview with judge and former prosecutor (Feb. 7, 2014).

337. Nicholas D. Kristof, *What About American Girls Sold on the Streets?*, N.Y. TIMES, Apr. 24, 2011, at 10.

338. Lustig, *supra* note 105, at 41 (quoting former OJJDP head Robert J. Flores, who opposed decriminalization of juvenile prostitution).

339. This treatment of prostituted girls also contrasts notably with the portrayal of victims in child pornography cases, even where the children are of similar ages. See, e.g., *United States v. Cruikshank*, 667 F. Supp. 2d 697, 701 (S.D. W. Va. 2009) (calling for "severe" punishment for purchasers of child pornography because "[t]he most vulnerable members of our society have been exploited and discarded"). Numerous courts and

prostitution finding against a teenaged runaway: "It is not the State's duty to investigate whether or not [a child] is compelled."³⁴⁰ Most prostituted girls are "exploited" as prosecutors define that term in the statutory rape context, i.e. pressured through violence, economics, or romance into sex.³⁴¹ Many of them are also victims of violence.³⁴² Yet their exploiters are rarely prosecuted, and never for the more serious crime of statutory rape. This is despite the fact that they are inevitably the older male predators at whom the statutory rape laws are aimed. Although the criminal law does not preclude prostituted girls from simultaneously being victims and offenders, its enforcers continue to place girls in one category only, that of offender.

Indeed, prostituted girls are not only denied victimhood status, they are effectively defined to not even be children. They are not protected by the usual, and legal, definition of consent. Instead, their sexual "misbehavior" makes them capable of consent, regardless of their age. Accordingly, while girls under eighteen are incapable of consenting to prostitution under federal law, and those under sixteen or seventeen incapable of consenting to sex under most state laws, consent is deemed irrelevant to the conviction of girls as young as twelve or thirteen for prostitution.³⁴³ A New York appellate court confirmed this view in adjudicating a twelve-year-old guilty of prostitution in part because the anti-prostitution law "contain[ed] no age requirement."³⁴⁴ Many police officers and others do not see these children as victims, even those as young as ten and eleven years old, instead viewing them as "consenting participants."³⁴⁵ Since statutory rape is

scholars have criticized the exponentially escalating sanctions on users of child pornography. See, e.g., *United States v. Shannon*, 743 F.3d 496, 502–03 (7th Cir. 2014) (contrasting its holding with other circuits' broad bans on child and adult pornographic material); Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 270–72 (2001); Hessick, *supra* note 2, at 857–60. Carissa Hessick persuasively demonstrates that some possessors of child pornography are more severely sentenced than child abusers. *Id.* at 864–66.

340. Petition for Writ of Certiorari, *supra* note 101, at 3.

341. Levine, *supra* note 50, at 716–17.

342. See *supra* notes 102, 126 and accompanying text.

343. See 18 U.S.C. § 1591(c) (2012) (establishing strict liability for commercial sex acts with individuals younger than eighteen); Annitto, *supra* note 20, at 32 (explaining that six states have elected their age of consent to be seventeen).

344. *In re Nicolette R.*, 779 N.Y.S.2d 487, 488 (App. Div. 2004).

345. Hansen, *supra* note 31 (quoting an Atlanta judge); see also Telephone Interview with former prosecutor (Jan. 6, 2014) (explaining that many police officers, prosecutors and judges see these girls as "choosing the life, volitional"). Contrast this statement from a girl prostituted at age fourteen. "Whenever I would get into a car some part of me hoped

particularly pernicious as a “theft of childhood,”³⁴⁶ prostituted girls, too promiscuous and jaded to be true children, are outside the doctrine’s protection.

Consent is partially a normative concept, a “legal fiction” reflecting societal views on values such as autonomy and blame.³⁴⁷ Because their lack of chastity has rendered them both adult and culpable, prostituted girls are often seen as voluntarily entering prostitution.³⁴⁸ One juvenile court judge emphasized this by describing a fifteen-year-old girl, prostituted at age twelve when she ran away from foster care, as “*cho[osing]* to engage in the ‘street life.’”³⁴⁹ The court refused to substitute a status offense for the delinquency case, faulting the girl for having not fully cooperated with services or the prosecution of her pimp/boyfriend, and for not being “willing” or able to care for her baby.³⁵⁰ This placed the girl in a catch-22: too immature to be trusted with services and nonconfinement, yet too “experienced” to be considered a victim.

Finally, girls who are sexually impure frequently incur more anger and worse treatment than girls who commit violent or more serious crimes. Police officers’ extremely harsh treatment of both

that this guy would see me as the child I was and I wouldn’t have to do it. But in the back of my mind I knew that wasn’t going to happen” Philip Martin, “*Pretty Woman*” *vs. The Real World of Prostitution*, WGBH NEWS (Nov. 19, 2013, 8:55 AM), <http://wgbhnews.org/post/pretty-woman-vs-real-world-prostitution>.

346. Levine, *supra* note 50, at 711 (quoting a prosecutor discussing statutory rape). Some statutory rape victims, particularly those who are sexually active or otherwise nonconforming, are also denied the protections of childhood. *See, e.g.,* Mariano Castillo, *Judge in Montana Teen Rape Case Has Been Tough in Other Cases*, CNN (Aug. 29, 2013, 8:37 PM), <http://www.cnn.com/2013/08/28/justice/montana-judge-profile/> (reporting that a judge recently attributed blame to the fourteen-year-old statutory rape victim because, among other things, she “seemed older than her chronological age”).

347. *See* Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 119 (1981). *See generally* PETER WESTEN, *THE LOGIC OF CONSENT* (2004) (asserting the idea of consent as a defense is a legal fiction). A full discussion of consent among adults in the commercial sex industry is beyond the scope of this Article, but it should be noted that the “legal fiction” of consent can be punitive to many young adults as well, who are only one year, or one day, removed from minority. *See* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 297 (2011) (“[I]f something is problematic [with juvenile prostitution], how does it change suddenly when she reaches seventeen years and three hundred sixty-six days old? If no one could enter commercial sex as a child, if the abuse of all those who did was retroactively redressed, the sex industry would be depopulated overnight.” (footnote omitted)).

348. *See supra* notes 343–45 and accompanying text.

349. *In re Bobby P.*, 907 N.Y.S.2d 540, 548–49 (Fam. Ct. 2010) (emphasis added); *see also* Kristof, *supra* note 337 (“[M]any Americans perceive [prostituted girls] not as trafficking victims but as miscreants who have chosen their way of life.”).

350. *In re Bobby P.*, 907 N.Y.S.2d at 548–49.

adult and juvenile prostitutes has been repeatedly noted.³⁵¹ This pattern extends beyond prostitution. For instance, police are more likely to release girls suspected of a crime than similarly situated boys, but more likely to arrest girls suspected of sex offenses.³⁵²

2. *Obedience.* The second value informing a girl's designation as worthy victim or culpable offender is her obedience, or lack thereof, to parental and state authority. Experts have repeatedly noted that societal expectations of girls as obedient and compliant—a “joy to their parents”—persist while boys are permitted, even encouraged, to be more independent and “wild.” As criminologist Todd Clear puts it:

There is something about “bad girls” that embarrasses us, makes us want to change the topic. The image of a “bad girl” is threatening and naughty, maybe even sexually dirty or unspeakable. For boys, breaking the rules can be seen as part of growing up—we say that boys are “precocious,” and when they get particularly rambunctious, they are “feeling their oats.”³⁵³

Girls have always comprised a disproportionate number of youth arrested and confined for status offenses.³⁵⁴ Status offenses center on disobedience, and include catchall terms such as “ungovernability,” rendering them applicable to virtually any adolescent behavior deemed undesirable.³⁵⁵ The tremendous discretion they afford decision-makers, both in their vague definitions and array of possible outcomes, renders them ideal vehicles for enforcing norms and roles. Status offenses, and

351. See *supra* note 112 (describing police abuse of those in the commercial sex industry, including minors); see also LLOYD, *supra* note 20, at 124 (“Cops see men buying girls on the street and look the other way, cops taunt girls and call them names, and some of the johns are cops themselves. . . . Some cops would take money from the girls . . . knowing that they could never report it.”); MOGUL, RITCHIE & WHITLOCK, *supra* note 33, at 62–63 (noting the “highly sexualized” and “misogynist” attitudes prevalent in the policing of sex work). Of course there are also police officers who “believe[] that girls are the victims, and pimps and johns the bad guys, and treated girls accordingly.” LLOYD, *supra* note 20, at 146. But most experts agree the latter group is the minority, albeit a growing one. *Id.*

352. CHESNEY-LIND & SHELDEN, *supra* note 249, at 200.

353. Todd R. Clear, *Foreword* to CHESNEY-LIND & SHELDEN, *supra* note 249, at xi. This quotation also reveals the related nature of these two central norms.

354. OJJDP 2006 REPORT, *supra* note 119, at 191 (noting that “[a] major difference between delinquency and status offense cases is the large proportion of status cases that involve females”).

355. The main charges are running away, truancy, and being incorrigible or beyond the control of one's parents. See, e.g., S.C. CODE ANN. § 63-19-20(9) (2010). Status offense proceedings are often parent-driven, and parents use them more frequently against girls than boys.

related contempt charges for violations of court orders, continue to be robustly used against girls, remaining a major gateway for them into the juvenile and criminal justice systems.³⁵⁶

Running away is a particularly frequent entry point for girls into the juvenile justice system, and it is the only offense other than prostitution for which girls comprise the majority of offenders.³⁵⁷ For juvenile arrests for the noncrime of running away, over half are female.³⁵⁸ Runaways are at great risk for entering prostitution. Most run because of sexual or other abuse, or serious family discord.³⁵⁹ Yet the reasons girls flee their homes for the streets, many of them repeatedly, are largely ignored. Instead of addressing girls' victimization in their families, police and courts have instead imposed harsh controls on at-risk girls, including incarceration, in the name of protection.³⁶⁰

Like girls who sexually act out, noncompliant girls are treated very punitively. Girl status offenders are significantly more likely than boys to be incarcerated, and receive longer sentences and harsher treatment every step of the way.³⁶¹ Indeed, police and courts frequently treat girls charged with status offenses or contempt charges more severely than girls or boys charged with crimes; they arrest them more often, and institutionalize them more frequently and for longer periods.³⁶² Repeat status offenders, particularly runaways, and girls who violate court orders are treated the most harshly.³⁶³ Police and

356. See WATSON & EDELMAN, *supra* note 295, at 2 (describing the disproportionate detention of girls for status offenses as a pathway into the juvenile justice system); see also Godsoe, *supra* note 16, at 1098 & n.39 (outlining data and describing the incarceration of status offenders pursuant to violation of a court order).

357. Puzzanchera & Adams, *supra* note 34, at 4.

358. *Id.*; see also OJJDP 2006 REPORT, *supra* note 119, at 191 (detailing data from 1985–2002).

359. *Homeless and Runaway Youth*, NCSL (Oct. 1, 2013), <http://www.ncsl.org/research/human-services/homeless-and-runaway-youth.aspx> (reporting that 75 percent of runaways are female and abuse or family discord are frequent causes).

360. WATSON & EDELMAN, *supra* note 295, at 2; see Godsoe, *supra* note 16, at 1101–02 (outlining the widespread detention and incarceration of runaways).

361. For instance, they are detained on average for twice as long as male status offenders. OJJDP 2006 REPORT, *supra* note 119, at 191–92, 208, 210. This is despite the fact that male status offenders are more likely to also have committed criminal offenses. *Id.* at 210.

362. See, e.g., WATSON & EDELMAN, *supra* note 295, at 1 (reporting that, in 2006, technical probation violations and status offenses comprised 25 percent of boys' detentions, versus 41 percent of girls', and summarizing data from Connecticut that "88 percent of girls who were adjudicated delinquent, and placed at the state's only secure facility for adjudicated juveniles, were status offenders").

363. See OJJDP 2006 REPORT, *supra* note 119, at 191; see also HANNAH BENTON ET AL., REPRESENTING JUVENILE STATUS OFFENDERS 66 (2010), available at http://www.americanbar.org/content/dam/aba/administrative/child_law/20100121_RJSO_Book.authcheckedd

probation officers report finding nonviolent female offenders particularly challenging to work with, characterize them as “mak[ing] inappropriate lifestyle choices” and “whining too much,” and often hold girls largely responsible for their own victimization.³⁶⁴ In sum, girls who fail to obey parents and courts draw much more ire than do boys or other female offenders.

The focus on obedience is particularly salient in the prostitution context because of the widespread discretion to designate girls as a victim or an offender, a designation that often turns on a girl's conformity to obedience and other feminine behavior.³⁶⁵ For instance, the most comprehensive study of prostituted children's treatment by the police found that statistically significant factors in a child's designation by police as a victim rather than an offender were: (1) a child's cooperation with the police; (2) obvious pimp or john involvement; and (3) a report to the police rather than police observation of prostitution during, for instance, a sting.³⁶⁶ Cooperation's relationship to obedience is clear. Yet included in this assessment are some factors over which the girls had no control, such as whether the girl was local or from another jurisdiction.³⁶⁷ A more visible pimp or john seems to enable police officers to more readily recognize a girl as a victim, perhaps because they have a concrete individual to blame for the harm; as the study's author noted, “youth who would not provide police with a person to blame [were] considered . . . culpable [by the police].”³⁶⁸ Finally, being reported

am.pdf (stating that if an accused status offender does not comply with court-ordered terms, the consequences may get much harsher); MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER* 64 (2013) (discussing studies where female repeat status offenders were six times more likely than male status offenders to be institutionalized).

364. Barry C. Feld, *Girls in the Juvenile System*, in *THE DELINQUENT GIRL*, *supra* note 37, at 225, 244 (internal quotation marks omitted); *see also* LAURIE SCHAFFNER, *GIRLS IN TROUBLE WITH THE LAW* 159 (2006) (quoting a female probation officer: “These girls are too rude and too loud; . . . they need to learn manners and better grooming.” (alteration in original)). Judges also find these girls particularly challenging. As one expert describes it: “Status offenders test judge's [sic] limits and their failure to comply with court orders may be perceived as an affront to judicial power.” JESSICA R. KENDALL, *ABA CTR. ON CHILDREN & THE LAW, FAMILIES IN NEED OF CRITICAL ASSISTANCE* 12 n.37 (2007).

365. *See* NRC, *supra* note 7, at 5–7 (outlining the issues behind sex trafficking definitions such as “victim” and “offender”); Finkelhor & Ormrod, *supra* note 7, at 4 (noting that designation as an offender or victim turns in part on “personal characteristics of juvenile victims”).

366. Halter, *supra* note 17, at 156. The vast majority of minors were categorized as one or the other, with police identifying only a few minors as both. *Id.* at 154.

367. *Id.* at 155, 157.

368. *Id.*

as opposed to being observed may indicate to police that a child wants assistance, whereas youth observed by police in the act were frequently deemed "complicit" in their prostitution. None of these are legal factors pertinent to determining offender or victim status, as is, for instance, age of consent in statutory rape cases.

Girls' obedience is scrutinized at every point in the system, from respect for police, to immediate acceptance of services, cooperation with court orders, or a permanent exit from prostitution after a first arrest. Failure to comply results in increasingly punitive interventions. Prosecution and incarceration, as one criminal justice official put it, compel prostituted girls to "feel there will be repercussions for dropping out."³⁶⁹ Other authorities describe prostituted minors as "streetwise [girls] who do not obey rules and are not willingly compliant with authority."³⁷⁰ These girls, however, do not need external sanctions to encourage them to leave "the life"; research shows that the majority want to, but lack the resources to do so.³⁷¹ The focus on obedience permeates even recent laws decriminalizing prostitution for minors. The majority of these laws apply only to children arrested for the first time, or give prosecutors and/or judges discretion to decide whether or not girls are worthy of being treated as minors or should instead be prosecuted.³⁷²

This emphasis on compliance and gratitude for being "rescued" ignores both safety concerns for girls who cooperate and the psychological trauma literature about prostituted children.³⁷³ A girl's connection to her pimp and her abuse may cause her to react negatively to any efforts to control her behavior, even if intended to help her.³⁷⁴ Nonetheless, the view that a girl's failure to exit the sex industry is a personal failing, even an act of defiance to authorities, remains widespread. Testimony by the head of a city's newly created anti-trafficking division is illustrative: "Teen prostitutes

369. Feinblatt, *supra* note 18. At least one prosecutor has even argued that incarceration would not only help a girl, but that she might enjoy it. Petition for Writ of Certiorari, *supra* note 101, at 3 ("[She] may be perfectly happy where she is [in jail].").

370. LLOYD, *supra* note 20, at 246 (quoting a memo opposing New York's Safe Harbor legislation).

371. See *supra* note 116.

372. This decision often turns on a girl's compliance with court orders. See discussion *supra* Part II.B.2.

373. It also obscures the lack of appropriate treatment options, both in the community and in prison, which frequently underlies noncompliance.

374. See, e.g., Beyer, *supra* note 103, at 20 (discussing how girls that are sexually and physically traumatized often react negatively to "outside control").

hard to save, cop tells City Council . . . police say they are trying to rescue teens forced into prostitution, only to find that the girls often *don't want their help*.”³⁷⁵

As noted earlier, many individual police, prosecutors and judges have benevolent aims, truly believing that criminal sanctions are “for the girls’ own good.” Many are frustrated with the lack of appropriate services, particularly housing, for prostituted, runaway, and other at-risk girls.³⁷⁶ Police and others “may feel that their hands are tied” if they find a prostituted girl because they cannot detain her securely, i.e. lock her up, without a criminal charge.³⁷⁷ They are, with valid reason, concerned about girls running away from a foster home or other nonsecure shelter, and being wooed or threatened back into the life by a pimp. As one Chicago police officer asked:

What do you do with these, you know, juveniles in the mean time [sic] [before there is safe housing]? . . . So many of them . . . are just chronic runaways. You need a place where they can stay where they can be safe . . . because there is so much violence out there in the prostitution world.³⁷⁸

Similarly, an Atlanta judge lamented jailing an eleven-year-old prostituted girl: “The last thing I want to do is detain her . . . [b]ut I’ve got to make sure that she’s safe.”³⁷⁹ Some authorities even demonstrate an explicitly parental attitude in prosecuting these girls. Typical is one vice police officer who sought incarceration for a teenaged girl he arrested for prostitution because “[i]f she was your daughter, what would you want the [police department] to do to keep her off the street? If you had a child, sometimes you’ve gotta know you’ve gotta put ‘em in time out.”³⁸⁰

No matter how well intended, however, these interventions cause more harm than good. The “stick” of prosecution does not help girls exit prostitution and jail is not akin to a time-out. Police and other criminal justice actors are frequently too quick

375. Alison Bowen, *Teen Prostitutes Hard to Save, Cop Tells City Council*, N.Y. METRO (Oct. 19, 2011), <http://www.metro.us/local/teen-prostitutes-hard-to-save-cop-tells-city-council/tmWkjs---b6GoCwIA4tJU/> (emphasis added).

376. Sullivan, *supra* note 182 (quoting a police officer decrying the lack of services for prostituted girls).

377. Halter, *supra* note 17, at 157.

378. ASHLEY, *supra* note 86, at 45 (internal quotation marks omitted).

379. Hansen, *supra* note 31.

380. Spangenthal-Lee, *supra* note 135; see also Feinblatt, *supra* note 18 (“As any parent knows, there comes a time when ‘tough love’ is the only thing that will get a child to stop destructive behavior.”).

to dismiss interventions other than criminal.³⁸¹ This “lock it up” culture is a major barrier to a truly protective or rehabilitative approach.³⁸² Finally, the lack of political will to change the current system demonstrates that the desire to label and control girls based on their sexual conduct persists more broadly.³⁸³

V. POLICY IMPLICATIONS: MOVING BEYOND “TOUGH LOVE”

As the foregoing account illustrates, the criminal law is too blunt an instrument to address a complex social problem like juvenile prostitution.³⁸⁴ A handful of courts and legislatures are beginning to recognize this. For instance, one state criminal court judge recently dismissed a prostitution case against a sixteen-year-old girl in part because: “[T]he public’s confidence in the criminal justice system will be enhanced by a dismissal here. The criminal justice system is not always the best venue for addressing societal problems.”³⁸⁵ There has also been a small but growing movement to decriminalize juvenile prostitution based on many of the arguments made here. New York was the first

381. This is true even in jurisdictions proclaiming a new victim-friendly approach to commercial sex and trafficking. For instance, several counties in California recently announced their shift to view prostituted people as “victims, not criminals.” Matt Fountain, *SLO County Prosecutors to View Prostitutes as Victims, Not Criminals*, TRIBUNE (Mar. 17, 2015), http://www.sanluisobispo.com/2015/03/17/3542351_prostitution-sex-trafficking.html?rh=1. Yet the district attorney conceded that “[i]n some cases, especially those involving [minors], the only way to get a trafficking victim into the system where they can get help is to charge them with a crime.” *Id.*; see also Shafer, *supra* note 11 (quoting a police officer that in his opinion “they are all victims,” but noting that while “they are not looking to arrest their way out of the problem,” arrest is an effective way to get girls and women off the street and into services).

382. My thanks to former prosecutor for this term. Telephone Interview with former prosecutor (Jan. 6, 2014).

383. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517–18 (2001) (describing the tendency to over-criminalize in the quest for simplistic solutions to complex social problems).

384. I am mindful of the critiques of decriminalization. Scholars such as Alexandra Natapoff persuasively argue that decriminalization has a net-widening effect and that many of those ensnared may end up in the criminal justice system, even incarcerated, in any event. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. (forthcoming 2015). I am not arguing here for full decriminalization; rather for a shift in focus from punishing prostituted girls to pursuing their customers and pimps. Increased enforcement and greater sanctions against johns and pimps is essential to addressing the exploitation of children. Several states are considering legislation to these ends. See, e.g., S.B. 427, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (proposing increased fines for customers of prostituted minors).

385. *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402, at *6–7 (N.Y. Crim. Ct. Dec. 16, 2011); see also *Changing Perceptions: A Conversation on Prostitution Diversion with Judge Fernando Camacho*, *supra* note 227 (explaining that he began to divert prostituted girls from prosecution because “[i]t wasn’t fair, it wasn’t just . . . Jail is not the right place for these [children].”).

state to pass a “Safe Harbor” statute, in 2008, and to date, over fifteen other states have enacted similar legislation.³⁸⁶

Most of these reforms, however, do not go far enough. All states but Illinois and Tennessee, for instance, retain the option to prosecute minors for prostitution.³⁸⁷ Full decriminalization in the other states was opposed, usually by prosecutors, judges, and police, who argued that they needed to retain the ability to incarcerate prostituted minors.³⁸⁸ As a result, even in states with “Safe Harbor” laws, minors continue to be arrested and incarcerated on prostitution-related charges. Similarly, courts have declined to immunize from prosecution even girls who demonstrate extreme indicia of victimhood.³⁸⁹ Because this discretion risks both selective enforcement and the ongoing punishment of nonculpable people, I have argued that prostituted girls should not be treated as offenders under any circumstances.³⁹⁰

This Part sketches out three possible alternative approaches. Any approach must be transparent and accountable, two things lacking in punitive paternalism. My outline here is not exhaustive, nor are my conclusions more than tentative. Rather, I hope to illustrate the parameters and implications of these

386. As of January 2015, the following states had enacted “Safe Harbor” statutes. A growing number of states are doing so, so the number may increase shortly. CONN. GEN. STAT. ANN. § 53a-82 (West Supp. 2014); Florida Safe Harbor Act, Ch. 2012-105 (codified at FLA. STAT. ANN. §§ 39.001, 39.401, 409.1678, 800.04 (West Supp. 2015)); 720 ILL. COMP. STAT. ANN. 5/11-14(d) (LexisNexis Supp. 2014); KY. REV. STAT. ANN. § 630.125 (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 119, § 39L (West Supp. 2014); MICH. COMP. LAWS ANN. § 750.451(6) (West Supp. 2014); MINN. STAT. ANN. § 260B.007(6)(c) (West Supp. 2014); MISS. CODE ANN. § 97-3-54.1(4) (West Supp. 2014); NEB. REV. STAT. § 28-801(5) (2008 & Supp. 2013); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis Supp. 2013); N.J. STAT. ANN. § 2A:4A-71(b) (West Supp. 2014); N.Y. FAM. CT. ACT § 311.4(3) (McKinney Supp. 2014); N.C. GEN. STAT. § 14-204(c) (2013); OKLA. STAT. ANN. tit. 21, § 1029(C) (West Supp. 2015); TENN. CODE ANN. § 39-13-513(d) (Supp. 2013); UTAH CODE ANN. § 76-10-1302(c)–(d) (LexisNexis 2012 & Supp. 2013); VT. STAT. ANN. tit. 13, § 2652(c)(1)(B) (Supp. 2013); WASH. REV. CODE ANN. § 9A.88.040 (West Supp. 2015).

387. Half the safe harbor laws grant discretion to prosecute any children, whatever the age, under certain circumstances, rendering them more diversion programs than actual decriminalization. This discretion is often broad and linked to obedience of court orders and other mandates. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 39L(c) (granting judicial discretion to restore delinquency or criminal proceedings against a prostituted child if she “failed to substantially comply with [the conditions of probation] or [if] the child’s welfare or safety so requires”).

388. *See, e.g.*, Feinblatt, *supra* note 18.

389. *See* discussion *supra* Part IV.B (including discussion of *In re Bobby P.*, where the court continued delinquency proceedings against a fifteen-year-old girl despite ample evidence that she had been under the control of an adult pimp and traumatized).

390. I limit this to prostitution-related offenses, although some advocates have argued, with limited success, for lesser culpability for trafficking victims in other cases such as robbery. Telephone Interview with defense attorney (June 15, 2013).

approaches for prostituted girls, and for the criminal law more generally.³⁹¹

A. *Status Offender Jurisdiction*

The majority of the safe harbor laws treat prostituted minors as status offenders.³⁹² This approach has some benefits, including the lack of stigma and collateral consequences of a criminal adjudication, as well as the prohibition on incarceration for status offenders. It sends a message that prostituted children are not criminal offenders, although this message is somewhat mixed due to the quasi-criminal nature of the status offense system.³⁹³ Finally, it allows courts to retain jurisdiction over minors to mandate or encourage their connection to social services and treatment.

There are also, however, considerable drawbacks to addressing this problem through the status offender system. This system brings considerable harms including stigma and possible incarceration on contempt charges.³⁹⁴ Indeed, the punitive nature of the status offender system, despite its lack of due process protections, has led to recent attempts at reform, including proposed federal legislation.³⁹⁵ The status offense system has historically been, and continues to be, used to regulate the noncriminal behavior of girls, and has been notably unsuccessful at helping them due to its largely punitive nature and its failure to address the underlying causes of, for instance, runaway behavior.³⁹⁶ The system lacks resources, in particular the specialized services and secure housing prostituted girls need. Diverting prostituted girls to the status offender system will

391. Any effective approach would have to take into account the unique risks and situations of girls, unlike the current juvenile and criminal justice systems which are designed and implemented for male offenders. *See infra* Part V.A–C.

392. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 39L.

393. *See* Godsoe, *supra* note 16, at 1100–01; *see also* Janet C. Sully, Note, *Precedent or Problem?: Alameda County's Diversion Policy for Youth Charged with Prostitution and the Case for a Policy of Immunity*, 55 WM. & MARY L. REV. 687, 710–11 (2013) (suggesting that immunity gives girls accused of prostitution mixed messages from the judicial system).

394. The consequences of status offenses can be very similar to those of criminal or delinquency adjudications, including institutionalization, sentencing enhancements in future criminal proceedings, and stigma.

395. This issue has recently captured public opinion. *See, e.g.*, Editorial, *Kids and Jails, a Bad Combination*, N.Y. TIMES, Dec. 29, 2014, at A16 (decrying the “counterproductive practice of throwing children in jail for ‘status offenses’”). Senators Grassley and Whitehouse introduced the Reauthorization of the Juvenile Justice & Delinquency Prevention Act in December 2014.

396. *See supra* notes 354–60 and accompanying text.

likely have similar results.³⁹⁷ Girls will be stigmatized, perhaps even incarcerated, and yet will emerge no better able to exit the life. Finally, this approach is even less transparent than the criminal justice system and potentially widens the net to regulate greater numbers of girls.

B. Child Protection Treatment

A handful of states have chosen to address prostituted children at least in part through the child protection system (CPS).³⁹⁸ Under this model, prostituted minors are categorized as abused or neglected children, subject to mandatory reporting by teachers and doctors, and eligible for services and placement in protective custody at a medical facility or foster home, rather than jail.³⁹⁹ There are numerous advantages to this approach. First, it is far less stigmatizing than the criminal or status offender systems while allowing for ongoing court jurisdiction and services. It also conveys the unequivocal message to these girls and the public at large that prostituted children are victims, not culpable for their exploitation. This framework is consistent both with other laws, including statutory rape and trafficking laws, as well as with the medical model which defines commercial sexual exploitation as child maltreatment.⁴⁰⁰ Treating prostituted girls as maltreated children would, however, bring more than expressive value. The majority of them have suffered abuse both before and during prostitution and can benefit from the system's services.⁴⁰¹ Moreover, prostituted children will likely be more receptive to the police and prosecutors if they do not have to fear criminal or status offender

397. Indeed, a large percentage of them have been through the system before. See Godsoe, *supra* note 16, at 1103–04; see also AM. BAR ASS'N & NAT'L BAR ASS'N, JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM 19–20 (2001), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_justicebygenderweb.authcheckdam.pdf (outlining studies which indicated that girls are more likely than boys to return to detention within one year).

398. See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-14(d) (LexisNexis Supp. 2014).

399. Prostituted girls fit within existing definitions of abused or neglected children under most current state laws, either because of abuse suffered while in their parents' care or abandonment. Cf. Gregory A. Loken, "Thrownaway" Children and Throwaway Parenthood, 68 TEMP. L. REV. 1715, 1736–38 (1995). Alternatively, states might amend their child protection laws to incorporate a new category of prostituted children.

400. See, e.g., Mary P. Alexander, Nancy D. Kellogg & Phyllis Thompson, *Community and Mental Health Support of Juvenile Victims of Prostitution*, in MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 397, 397 (2005).

401. See *supra* notes 113–20; see also Annitto, *supra* note 20, at 29 (noting that the child protection system exists to protect abused and neglected children, which includes CSEC).

treatment, and potential incarceration. This approach could thus help both with girls exiting prostitution and with the prosecution of pimps and other exploiters.

There are also considerable drawbacks to this approach. First, the fact that many prostituted children were involved with the CPS before being prostituted indicates that the system was not addressing their abuse and other needs even then.⁴⁰² Indeed, the very strong correlation between a history of abuse and juvenile prostitution has led some experts to conclude that the societal failure to effectively respond to child maltreatment is largely responsible for children becoming prostituted.⁴⁰³ Second, the problems with the CPS are legion—it is consistently underfunded and overburdened, and many children in foster care emerge worse off than if they had been left home.⁴⁰⁴ Finally, the CPS in most places currently lacks the specialized services and safe housing that these girls require.⁴⁰⁵ This leaves prostituted girls in the system both more accessible to their pimps, and thus vulnerable to a return to prostitution, and less likely to successfully heal from their trauma.⁴⁰⁶

C. *Nonlegal Interventions*

A third possible approach would be to treat prostituted children outside of the legal system, in a public health or similar framework. A public health approach focuses on harm prevention by reaching vulnerable individuals earlier and addressing underlying causes.⁴⁰⁷ No state yet addresses juvenile prostitution in this fashion, or even significantly attempts to do so. While a few nonprofits currently provide services to “voluntary,” i.e. noncourt-ordered, prostituted minors, funding is scarce and space

402. See *supra* notes 113–20.

403. See Mitchell, Finkelhor & Wolak, *supra* note 17, at 19.

404. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 656–60 (2006) (outlining the myriad failings of the child protection system).

405. Relatedly, most child protective workers do not have the training or procedures to identify prostituted children. See CTR. FOR THE HUMAN RIGHTS OF CHILDREN, BUILDING CHILD WELFARE RESPONSE TO CHILD TRAFFICKING 13 (2011), available at <http://www.luc.edu/media/lucedu/chrc/pdfs/BCWRHandbook2011.pdf>.

406. Pimps often recruit girls from foster care, knowing that they are particularly vulnerable. See *supra* note 97.

407. See generally Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1662–65 (2011) (discussing Public Health Law Research programs which fund “interventional” health laws and “address differences in underlying resources and opportunities that are the root causes of health inequalities across social groups”).

limited.⁴⁰⁸ Numerous researchers have recommended a public health approach, based in part upon the failure of criminal and other legal interventions to reduce child sexual exploitation.⁴⁰⁹

A public health approach could bring numerous advantages. Virtually stigma-less, it would treat prostituted children as victims, consistent both with other laws and the reality of their experience. This approach would reap the same benefits, if not more, as a child protection one, by reaching more girls and building their trust in the police and others, thus facilitating the detection and prosecution of exploiters. It would also likely be more effective at eradicating sexual exploitation by intervening earlier and addressing the root causes, including familial abuse.⁴¹⁰ Further, a public health approach would bring together institutional stakeholders, including law enforcement and social service agencies, which do not often collaborate. Finally, such an approach would address prevailing views about culpability and responsibility for nonconforming minors.⁴¹¹ To this end, criminal justice system actors and the public need education about the causes and realities of juvenile prostitution, as do children about the dangers of exploitation.⁴¹² One recent successful initiative to this end is a public education campaign led by a California district attorney, featuring billboards with messages such as: "Buying a teen for sex is child abuse. Turning a blind eye is neglect."⁴¹³

Although in theory such an approach is the most effective one, in practice it has several limitations. While some public health campaigns have been successful at changing behavior,

408. Two such agencies are MISSEY (Oakland, California) and GEMS (New York City, New York), which provide services both to court-involved and noncourt-involved prostituted girls. See *Our Services*, MISSEY, <http://missey.org/our-services/> (last visited Apr. 18, 2015); *What We Do*, GEMS, <http://www.gems-girls.org/about/what-we-do> (last visited Apr. 18, 2015). Even voluntary services, however, can include "crisis holds" for several weeks in a secure place. Some other countries have implemented these to address safety concerns about runaways and prostituted youth.

409. See, e.g., NAT'L COALITION TO PREVENT CHILD SEXUAL ABUSE & EXPLOITATION, NATIONAL PLAN TO PREVENT THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN 9 (2012), available at <http://preventtogether.org/Resources/Documents/NationalPlan2012FINAL.pdf>.

410. For instance, some jurisdictions are beginning to focus on tracking repeat runaways as a method of reducing juvenile prostitution. See Ian Urbina, *Legislators Moving to Fill in Cracks That Teenage Runaways Can Slip Through*, N.Y. TIMES, Jan. 4, 2010, at A10.

411. See *Changing Perceptions: A Conversation on Prostitution Diversion with Judge Fernando Camacho*, *supra* note 227 (noting that the first step is to "chang[e] the perception" of criminal system actors that these are "bad girls who like to do this").

412. Many system actors would welcome training; for instance, police officers from across Illinois cited training for themselves as one of the most urgent needs. See ASHLEY, *supra* note 86, at 42–43.

413. Romney, *supra* note 42 (internal quotation marks omitted).

(certain anti-smoking campaigns come to mind) this can take considerable time, and attitudes are often very difficult to change, particularly ones as deeply entrenched as gender roles. Moreover, by relying on voluntary referrals and participation, such an approach might reach too few prostituted minors. Most significantly, such an approach does not comport with current funding and political realities. Particularly in fiscally strained times, like now, funding and services tend to attach to statuses. Accordingly, prostituted children are more likely to receive services and housing if they are identified as being a status offender or an abused child.⁴¹⁴ Even then, services and housing are not always provided.⁴¹⁵ Compounding this reality is the political preference for punitive over public health approaches, particularly as to issues with a criminal component.⁴¹⁶ As a result, most public health interventions are privately funded, and hence not implemented on a statewide or national scale.

Each of these three approaches brings both advantages and flaws. None of them alone is sufficient to address the many social, legal, and political realities underlying sexual exploitation. Rather, some combination of them is necessary to effectively address this problem in both the short and long term.

VI. CONCLUSION

I do not claim to have a ready solution to the complex problem of juvenile prostitution. Instead, I hope to bring this understudied issue into view, and highlight the importance of what may appear to some as trivial parts of the criminal justice system—misdemeanors and juveniles. Exploring these areas at the margins of the criminal system can reveal larger dynamics, such as the system's highly gendered nature and the tensions that may exist between theories of punishment and punishment's implementation.

I also aim to tell a cautionary tale about the criminal law. The treatment of prostituted girls demonstrates the dangers of using criminal sanctions to address self-victimization or enforce

414. Many of them would qualify for relief as victims of trafficking laws. Currently, anti-trafficking laws are not being robustly enforced, and many state laws are unfunded mandates. Consequently, they are not yet capable of covering the large population of prostituted children. *See generally* Adams, Owens & Small, *supra* note 5, at 7–8 (discussing the lack of enforcement of child trafficking laws and the need for more access to services for victims). It is, however, a promising avenue for future exploration.

415. This has been the case in New York where the safe housing and services under the Safe Harbor Act have been consistently underfunded.

416. *See* discussion *supra* Part IV.B.

social norms unrelated to harm to others. Quite simply, the costs vastly outweigh the benefits. These costs include disproportionate and ineffective sanctions for the girls, and eroded legitimacy of the criminal justice system as a whole. The criminal justice system is an important tool, but it is only one tool. It cannot and should not be our only approach to the problems of runaway and sexually exploited children.

Much work remains to be done. No prostitution statute before 2008 considered age and most still do not. Even those states that have partially decriminalized juvenile prostitution, or that endeavor to see these minors as victims, continue to arrest and prosecute them.⁴¹⁷ The vast numbers of prostituted minors, the lack of meaningful interventions, and the remaining discretion of police and others makes widespread change extremely difficult. The juvenile justice system's long history of treating nonconforming girls as offenders is also a powerful counterweight to any reform.

Nonetheless, discussion of the issue is an important first step. Prostituted girls have been virtually invisible until recently. Public discourse about commercially sexually exploited children, however, has begun to increase rapidly.⁴¹⁸ This discussion will allow for a more honest assessment of the costs and benefits involved in the current approach, costs both societal and, in a very real sense, human.

417. See *supra* notes 387–90 and accompanying text.

418. News coverage of prostituted minors in the decade 2000–2010 was quite scant; while from 2011 to 2015, there are several stories a week on the topic. Advocates are also increasingly focusing on this issue, and raising it in broader forums. For instance, the Inter-American Commission on Human Rights held a hearing in March 2015, where advocates argued that the prosecution and incarceration of prostituted minors is a human rights violation. Dawson, *supra* note 7.