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AN ESSAY ON THE PRODUCTION OF YOUTH PROSTITUTION

Libby Adler

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AN ESSAY ON THE PRODUCTION OF YOUTH PROSTITUTION

*Libby Adler**

I. INTRODUCTION

Youth prostitution is more multidimensional than I think most of us are prone to admit. This essay is designed to raise the profile of some of its less prominent aspects— aspects which are not unknown exactly, but which are underrecognized and generally ignored in the context of legal analysis. The phenomenon of youth prostitution involves some thorny, sometimes confusing, issues, but those issues are eclipsed by an ideology that fails to grapple with the complexity of youth agency and the consequent position of youth in law. The result is that some kids are left inadequately served and others are utterly unknowable. My principal aim in this essay is to illuminate some gaps in the prevailing conception of youth prostitution. I hope merely to light the subject from a slightly different angle rather than perform a thoroughgoing analysis.

The essay proceeds as follows: Part II draws on the empirical research of others to introduce youth prostitutes in the United States. It discusses who the youth are and under what conditions they sell their labor. Part III briefly summarizes the laws on the books and what reform-minded professionals are saying. Part IV, then, identifies two principal shortcomings in the prevailing conception of youth prostitution: the low profile of its private law dimension and a conflicted ideology about youth agency that forces us to privilege an image of an exploited innocent because the only other option appears to be one of a fully formed, autonomous sexual bargain-seeker. Part V concludes by advocating a braver and more compound view of youth and, consequently, of youth prostitution.

II. YOUTH PROSTITUTES

Over 300,000 youth may be prostituting themselves in the United States, according to a recent estimate by two empiricists at the University of Pennsylvania School of Social Work, Richard Estes and Alan Weiner.¹ Their research makes

* Assistant Professor of Law, Northeastern University. My appreciation goes to Janet Halley, Nancy Hathaway, and Wendy Parmet for comments on earlier drafts, Dan Danielson, Dick Daynard, Stacey Dogan, Betsy Hinden, Martha Minow, Mary O'Connell, Steve Subrin, and Lucy Williams for many helpful conversations during the development of this paper, and Michelle Pearse for consistently speedy and thorough research support. Thanks also to Jenny Wriggins and the editors of the *Maine Law Review* for organizing this symposium.

1. RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 146-50 (2001) [hereinafter *ESTES & WEINER*]. All page numbers refer to the Full Report of the U.S. National Study, available at <http://caster.ssw.upenn.edu/%7Eeresstes/CSEC.htm> (last visited Sept. 30, 2002). My paper owes much to this seminal empirical study of youth prostitution in the countries of North America. As will be evident, I rely heavily on its U.S. findings, particularly in Part II, though Estes and Weiner themselves describe their data as "first generation" and advise that their numbers represent estimates of children "at risk" of sexual exploitation rather than the "actual number of cases." *ESTES & WEINER, supra*, at 5, 142-43.

evident that any one profile of the youth prostitute in the United States is an injustice; youth prostitutes compose a diverse group in every respect.

They come from every racial background.² Some are undocumented immigrants trafficked across borders for the purpose of prostitution, though most are American-born.³

Boys and girls do it,⁴ though I came across data that was not altogether consistent regarding their relative propensities. For example, a small study of homeless youth found that slightly more boys than girls had engaged in what has been called *survival sex*, or “the selling of sex to meet subsistence needs.”⁵ According to Estes and Weiner, however, girls and boys sell sex at nearly equal rates, with girls just marginally more likely to do so than boys.⁶

If Estes and Weiner are correct, though, then it is curious that in 1996, boys were more likely to be arrested for prostitution.⁷ One writer, who also observed that girls were more likely to be arrested for assault that year, contends that the disproportionate arrest rates can be explained by the proposition that kids are more likely to be arrested for gender transgressions.⁸ But another writer reported to the contrary: “[r]unning away and prostitution remain the only two categories where *more girls than boys* are arrested.”⁹ Presumably, this finding could be explained by the equally plausible countercontention that gender-*conforming* behavior subjects kids to a higher risk of arrest—that is, either gender deviance or gender conformance could be experienced as more offensive, depending on one’s ideological tendencies.

Interviews with youth prostitutes yielded one more interesting detail regarding sex-based proclivities: boys who prostitute themselves decline to don the label “prostitute.” They instead refer to themselves using a term that connotes greater agency on the part of the seller: “hustlers.”¹⁰

Girls in gangs are overrepresented.¹¹ They are typically contributing to the gang economy, either by bringing income to the gang or by earning their keep by providing a service to the “alpha” male gang members.¹²

2. *Id.* at 91.

3. *See id.* at 73, 78-79 (shelter population samples), 114-15 (countries of origin). American kids are sometimes trafficked *outside* of the United States to sell sex, as well. *Id.* at 73. Youth prostitution is a phenomenon of international dimensions, sometimes involving traffickers or organized crime rings, though I do not discuss these components in this essay.

4. *Id.* at 128.

5. Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, AM. J. OF PUB. HEALTH, 1406, 1406-08 (1999). *See also* ESTES & WEINER, *supra* note 1, at 11.

6. *See* ESTES & WEINER, *supra* note 1, at 128 (citing interviews and arrest rates).

7. Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 BERKELEY WOMEN'S L.J. 40, 51 (1999) (citing a 1996 report by the U.S. Dept. of Justice entitled *Prevention and Parity: Girls in Juvenile Justice*, at 4).

8. *Id.*

9. Meda Chesney-Lind, *Are Girls Closing the Gender Gap in Violence?*, 16-SPG CRIM. JUST. 18, 21 (2001) (emphasis added).

10. *See* ESTES & WEINER, *supra* note 1, at 58-60. Ninety-five percent of prostitution services by boys consist of providing oral sex to men. *Id.* at 58. According to Estes and Weiner, these boys “experience a profound sense of shame about what they do . . . [and try to] keep some measure of control over these experiences (and their psyches) by refusing to participate in . . . anal intercourse.” *Id.* at 58-59.

11. *See id.* at 71.

12. *See id.*

Transgender kids, especially male-to-female, are disproportionately represented.¹³ Often, these kids are trying to earn enough money to pay for sex-reassignment surgery, and many are buying street-quality hormones.¹⁴

Gay, lesbian, and bisexual kids are overrepresented as well.¹⁵ While boy prostitutes typically serve adult male consumers, they do not necessarily identify as gay themselves, though disproportionately they do.¹⁶ Some of those boy prostitutes who identify as heterosexual regard paid sexual encounters with men strictly as hustles.¹⁷

Kids living in their original homes might be prostituted by their families to contribute to the household, or they might be prostituting themselves at school for extra cash.¹⁸ Homeless kids, however, constitute the majority of the overall prostituting population of youth.¹⁹

A significant number of homeless kids engage in survival sex.²⁰ These kids may be best understood as giving up sex in a *desperate exchange*²¹—they may be hungry, cold, and destitute and possess little else with which to bargain for life's basic necessities. They may also be drug-addicted or in some other way totally beholden to a person who is eager to exploit them.²²

13. See *id.* at 60, 72, 148.

14. *Id.* at 72.

15. Greene et al., *supra* note 5, at 1408-09. This may be related to the disproportionate number of gay and lesbian youth who run away after conflict with their parents over their sexual orientation. *Id.* (citing Gabe Kruks, *Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns*, 12 J. ADOLESCENT HEALTH, 515, 515-18 (1991)); Pennbridge J.N. et al., *High Risk Behaviors Among Male Street Youth in Hollywood, California*, AIDS EDUC. PREV., 24, 24-33 (Fall Supp. 1992). Research in Massachusetts has found that 26% of adolescent gay males are thrown out by their parents after disclosing their sexual orientation and that 25-40% of homeless youth identify as gay, lesbian, bisexual, or transgender. See *Massachusetts High School Students and Sexual Orientation Results of the 1999 Youth Risk Behavior Survey*, available at <http://www.bostonglass.org/whoweserve.htm> (citing a 1994 study by the Massachusetts Governor's Commission on Gay and Lesbian Youth) (last visited Sept. 3, 2002) (on file with the Maine Law Review). See also Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE VOLUME 3: PREVENTION AND INTERVENTION IN YOUTH SUICIDE 3-125 (Marcia R. Feinleib ed., 1989).

16. ESTES & WEINER, *supra* note 1, at 60. This study estimates that 25-35% of boy prostitutes identify as "sexual minorities," though 95% of the services that boys perform are for men. *Id.* at 59-60.

17. See *id.* Boys report engaging in sex for both money and pleasure. *Id.*

18. *Id.* at 69, 134, 156.

19. See *id.* at 131. "Previous estimates of the proportion of runaway and homeless youth, who engage in survival sex range from 10% to 50%." Greene et al., *supra* note 5, at 1406 (citations omitted).

20. ESTES & WEINER, *supra* note 1, at 131. According to the Greene study, 27.5% of youth living on the street and 9.5% of youth living in shelters had engaged in survival sex, though the authors suspected that study subjects "underreported their participation in survival sex, a highly stigmatized behavior." Greene et al., *supra* note 5, at 1408.

21. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 102 (1983) (defining desperate exchanges as "trades of last resort," such as working for less than minimum wage, and pointing out that many such exchanges are prohibited under American law).

22. "Not infrequently, the pimp will father a child with the girl(s) . . . so as to deepen his control over them—typically such infants are . . . given over to someone in the pimp's extended family to raise." ESTES & WEINER, *supra* note 1, at 109.

Other prostituting young people, however, live a life of relative privilege. They may exchange sex for CD's, videogames, drugs, jewelry, or, in one case that I know of, books.²³ It is less evident that these exchanges can fairly be characterized as desperate.

Kids who sell sex have a broad consumer base, ranging from other kids at school or in their gang, to transients, truckers, military personnel, sex tourists, and customers who are less consistent and more opportunistic.²⁴ Some prostitution involves international trafficking or organized crime, some occurs in the context of small-scale organization (such as a pimp managing up to three prostitutes), and some is totally unorganized.²⁵ Girls are more likely to affiliate with pimps than boys,²⁶ and in one instance a group of transgender kids were found working for the benefit of a "queen mother."²⁷

Sometimes kids turn tricks, but they might also maintain longer-term relationships with adults who take them in and provide food, clothes, a place to shower, and maybe even affection.²⁸ Kids may experience their trade as prostitution, hustling, or something else entirely—such as a relationship with a loving caretaker,²⁹ hanging out where the party is, or just doing something adventurous.³⁰

Youth prostitution is happening in almost wildly varied contexts and involves young people who are diverse in every respect. The next Part summarizes the legal treatment of youth prostitution, as well as reformist thinking about how to deal with it more effectively.

III. LEGAL AND REFORMIST TREATMENT OF YOUTH PROSTITUTION

A. *Laws on the Books*

I was surprised to learn how many criminal prohibitions were potentially implicated in a single occurrence of youth prostitution. Imagine, for example, an instance involving an adult customer and a minor (of whatever sex)³¹ working for a pimp. In Massachusetts, each party has committed multiple offenses, though the offenses are by no means equally pursued by law enforcement.

23. *Id.* at 45, 131. See also *infra* note 111 and accompanying text.

24. ESTES & WEINER, *supra* note 1, at 99-105. See also *supra* notes 11-18 and accompanying text.

25. ESTES & WEINER, *supra* note 1, at 110-11.

26. See *id.* at 58, 60.

27. *Id.* at 72.

28. See Gabe Kruks, *Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns*, 12 J. ADOLESCENT HEALTH, 515, 518 (1991) (describing the one to two month cycle in which youths fall in love with a "sugar daddy" only to be disappointed when the exploitative nature of the relationship becomes evident). See also Colette L. Auerswald & Stephan L. Eyre, *Youth Homelessness in San Francisco: A Life Cycle Approach*, 54 SOC. SCI. & MED. 1497, 1504 (2002) (describing adults who "coax [kids] into exploitation with offers of a shower and a hot meal").

29. See Kruks, *supra* note 28, at 518.

30. See *infra* note 112 and accompanying text.

31. The legal implications may vary in a few states depending upon the sex of the prostitute and the customer. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding a state statutory rape law against an equal protection challenge to its facially different treatment of the sexes).

The minor has violated the basic prohibition against prostitution, or “engag[ing] in sexual conduct . . . for a fee.”³² He or she might also have committed the offense of being a “common night walker[,]” or “common street walker[,]” or have engaged in “lewd” or “lascivious . . . speech or behavior,”³³ or even “open and gross lewdness.”³⁴ Depending on the sexual services provided, the minor might have violated one of the antisodomy statutes, unhelpfully proscribing the “abominable and detestable crime against nature” and “unnatural and lascivious act[s],” respectively.³⁵ For the less adventurous customer, the minor might have violated the law against fornication.³⁶ If the customer is married,³⁷ the minor participated in adultery.³⁸

32. MASS. GEN. LAWS ANN. ch. 272, § 53A (West 2000).

33. *Id.* § 53.

34. *Id.* § 16.

35. *Id.* §§ 34-35. It might not be immediately apparent what these two statutes mean or what distinguishes them from one another, but the Supreme Judicial Court of Massachusetts has sorted it out. Section 34, the “abominable and detestable crime against nature” refers to anal penetration and bestiality, while in section 35, “unnatural and lascivious act[s]” includes oral-genital and oral-anal contact. *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d 38, 40 n.3 (Mass. 2002). In this decision, the Massachusetts court also clarified that sections 34 and 35 are inapplicable to “acts conducted in private between consenting adults.” *Id.* This holding extended an earlier decision, *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974), in which the same court found that “consensual conduct in private between adults is not prohibited by § 35.” *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d at 40 (quoting *Commonwealth v. Balthazar*, 318 N.E.2d at 481).

In *Balthazar*, a defendant appealed his conviction under section 35 on the grounds that that section was unconstitutionally vague. *Commonwealth v. Balthazar*, 318 N.E.2d at 479. The Massachusetts court found that its own construction (applying the provision to Balthazar’s nonconsensual conduct was sufficient to rescue the statute from vagueness). *Id.* at 481. Balthazar then sought and was awarded habeas relief in federal court because he lacked notice of the meaning of the statute before the state court explained it, which the state court did not do until *his case*. See *Balthazar v. Superior Court of Commonwealth of Mass.*, 573 F.2d 698 (1st Cir. 1978), *aff’g* 428 F. Supp. 425 (D. Mass. 1977).

The case brought by *Gay & Lesbian Advocates & Defenders (GLAD)*, however, was a different story. GLAD went to court seeking a declaratory judgment that the sodomy statutes violated privacy, equality, and other provisions of the state’s constitution. *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d at 40. The holding in this case essentially preserved the two sections against GLAD’s challenge even while limiting their applicability. In one sense this could be read as a victory, since private, consensual acts of sodomy have been technically “decriminalized” in Massachusetts, but in a jurisdiction where public and nonconsensual sex are already criminalized elsewhere among the state’s laws, it is not clear that sections 34 and 35 add much that is useful. See MASS. GEN. LAWS ANN. ch. 265, §§ 13H, 22A (West 2000) (criminalizing nonconsensual sex); ch. 272, §§ 16, 53 (criminalizing public sex). Rather, these two sections and their strangely potent vagueness seem to exist just to hurt.

In *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993), Janet Halley confronts much more elaborately the damaging power of sodomy statutes. *Id.* at 1721.

Sodomy statutes maintain themselves in part by their equivocal reference to identities and/or acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity. . . . [H]eterosexual identity becomes superordinate not because it is absolutely immune, but because it is intermittently and provisionally immune from regulation under the sodomy statutes.

Id. at 1722.

36. Ch. 272, § 18.

37. Estes and Weiner learned that a fair number of them are married. ESTES & WEINER, *supra* note 1, at 108.

38. Ch. 272, § 14.

The customer, again depending on the sexual acts committed and the customer's own marital status, may have been complicit in several of the transgressions above (engaging in sex for a fee, fornication, sodomy,³⁹ adultery), but he has committed others as well. He may have solicited a prostitute⁴⁰ and he probably contributed to the delinquency of a minor.⁴¹ Depending on the age of the minor, he may have committed rape and abuse of a child under the age of sixteen⁴² or indecent assault and battery on a child under fourteen.⁴³ These are the Massachusetts "age of consent" provisions, meaning that consent is not a defense for persons charged thereunder.⁴⁴ Read together, the consequence of these two sections is that a minor *under* the age of fourteen cannot consent to any sexual touching, one who has attained the age of fourteen can consent to sexual contact *other than* intercourse, but only a minor who has reached the age of sixteen can consent to intercourse. Finally, if the minor can be shown to have been "chaste" prior to the incident, the customer may be additionally liable for "induc[ing] any person under 18 years of age of chaste life to have unlawful sexual intercourse."⁴⁵

If a pimp recruited the minor and facilitated the transaction, in addition to his shared guilt for some of the offenses above (e.g., inducing the delinquency of a minor, solicitation), a few more criminal sanctions could accrue. The pimp might have "entice[d the minor] . . . from the house of his parent . . . for the purpose of prostitution."⁴⁶ He probably "induce[d the] minor to become a prostitute"⁴⁷ and he is likely "deriv[ing] support or maintenance . . . from the earnings or proceeds of prostitution committed by a minor."⁴⁸ If the pimp maintains a bordello, he could also be prosecuted for "keep[ing] a house of ill fame."⁴⁹

A single transaction could include upwards of a dozen criminal acts, and surely I have overlooked a few.⁵⁰ Although I have presented Massachusetts statutes exclusively, other states' statutes contain analogues. Fewer than half of the states

39. See also *id.* § 35A (criminalizing any "unnatural and lascivious act with a child under the age of sixteen)."

40. *Id.* § 8.

41. Ch. 119, § 63.

42. Ch. 265, § 23. This section requires a finding of intercourse, whether straight or "unnatural." *Id.*

43. *Id.* § 13B. This section does not require a finding of intercourse. *Id.*

44. The defense of consent is explicitly barred under section 13B and has been found to be barred under section 23. See *Commonwealth v. Elder*, 452 N.E.2d 1104 (Mass. 1983).

Age of consent rules raise a theoretical conflict. As William Eskridge has observed, liberals value choice in sex, such as "the right of women to say no to unwelcome activities and the right of sexual minorities to say yes to forms of pleasure they prefer," but this value is in tension with "the legal interpretation of an apparent yes or no [being] filtered through norms that are typically expressed in the form of status-based rules," such as age of consent laws. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 244 (1999). Eskridge calls this "The Liberal's Paradox." *Id.* at 245.

45. Ch. 272, § 4.

46. *Id.* § 2.

47. *Id.* § 4A.

48. *Id.* § 4B. Section 7 of this chapter prohibits deriving support from the earnings of a prostitute generally, not specifically involving youth. Presumably, this is a lesser included offense. *Id.* § 7.

49. *Id.* § 24.

50. I declined to include a trafficking component, for example.

prohibit fornication,⁵¹ but about half prohibit sodomy⁵² and most prohibit adultery.⁵³ All states have age of consent laws prohibiting varying sexual acts with minors of varying ages,⁵⁴ and all states prohibit prostitution as well as a cluster of related crimes (e.g., soliciting).⁵⁵ Again, enforcement of these different provisions varies.

B. Reform Proposals

Last year, the *Atlanta Journal-Constitution* ran a special series on youth prostitution with headlines that read *Runaway Girls Lured into the Sex Trade are Being Jailed for Crimes While Their Adult Pimps Go Free*,⁵⁶ and *THE PIMPS: Prostitution's Middle Man Slides By in Court*.⁵⁷ A review of court records in Georgia apparently revealed that pimps were arrested infrequently and that their cases were often dismissed.⁵⁸ Prosecutors who were interviewed complained that it was "difficult to build a case against pimps because prostitutes often are reluctant or scared to testify against them."⁵⁹ Reformers in Georgia are now pushing for more aggressive enforcement against pimps and "johns" and are asking for options other than imprisonment for the offending youth.⁶⁰

While Estes and Weiner found that children are too often regarded as "the problem,"⁶¹ reformist thinking generally seems to favor a shift in law enforcement focus toward adults, including both the johns and the pimps.⁶² As one child abuse prosecutor has written, "[p]rostituted children are victims, not criminals. The criminals are those who supply and those who demand the children."⁶³

Estes and Weiner have recommended a host of measures to address the commercial exploitation of children.⁶⁴ They urge, for example, fuller enforcement of existing criminal laws against adults,⁶⁵ stiffer penalties for sex crimes against children,⁶⁶ and the establishment of a national clearinghouse for intelligence on trends in child sexual exploitation.⁶⁷ Apart from more effective law enforcement, they

51. RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 98-102 (1996).

52. *Id.* at 65-71.

53. *Id.* at 103-10.

54. *Id.* at 44-64.

55. *Id.* at 155-87. Nevada is an exceptional case. Some prostitution is permitted, but state and local law contain numerous restrictions. *Id.* at 174-75.

56. Jane O. Hansen, *Special Report: Selling Atlanta's Children; 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 A1.

57. Jane O. Hansen, *Special Report: Selling Atlanta's Children; THE PIMPS: Prostitution's Middle Man Slides By in Court*, *ATLANTA J. & CONST.*, Jan. 7, 2001, at A1.

58. Hansen, *supra* note 56.

59. *Id.*

60. *Id.*

61. ESTES & WEINER, *supra* note 1, at 43.

62. See, e.g., Susan S. Kreston, *Prostituted Children: Not an Innocent Image*, 34 *PROSECUTOR*, Nov.-Dec. 2000, at 37, 40. Cf. Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 *SETON HALL LEGIS. J.* 1, 109, 119 (1997).

63. Kreston, *supra* note 62, at 40. See generally Justin Salvatore, *The Prostituted Child*, *NESPIN LAW ENFORCEMENT BULLETIN*, (New England State Police Information Network), May/June 2002, at 5, 5-10 (generally describing adult exploitation of innocent children).

64. See ESTES & WEINER, *supra* note 1, at 199-210.

65. *Id.* at 203.

66. *Id.* at 204.

67. *Id.* at 205.

observed a need for social services agencies to gain access to adequate resources to serve youth at risk of exploitation.⁶⁸

To assist them in identifying gaps in the systemic treatment of child sexual exploitation, Estes and Weiner administered a "stakeholder survey,"⁶⁹ in which they asked law enforcement officials and human service professionals to speculate about the order in which various factors influence the incidence of youth prostitution in their areas. Predictably, law enforcement officials thought local law enforcement was the most influential factor, while human services professionals ranked poverty most highly.⁷⁰

IV. CONCEPTUAL FAILURES

Notwithstanding the appearance that these two proclivities are at variance from one another, I contend that they are really two manifestations of a single ideology about the *position of kids in law*. Both the law and order types and the human services softies are singularly focused on the sexual exploitation of innocent youth by predatory adults. From a law enforcement angle, this leads naturally to a policy of arrest and prosecution of the exploiters, while from the human services perspective, the obvious course is a services-based approach targeting the exploited population. My position is not that this is wholly unreasonable, but that it is incomplete and has untold implications, nonetheless dominating the discourse to the exclusion of other dimensions of the phenomenon.⁷¹

In this Part, I argue that the conception of youth prostitution underlying prevailing policy impulses suffers from two shortcomings. First, it neglects the role of private law in conditioning the choice to engage in survival sex,⁷² and second, it is a feature of a conflicted ideology about youth agency that makes it difficult to see those kids who prostitute themselves outside the context of a desperate exchange. I consider each, in turn, below, appropriating one analysis developed in the context of labor and another developed in the context of gender.

A. Background Rules

The role of law in youth prostitution is understood by reformers largely from the perspective of the "criminalist," that is, one who is "obsessively focused on the

68. *Id.* at 202. Estes and Weiner are not the only reformers who have identified law enforcement and social services as the two critical areas on which to focus reform efforts. See, e.g., Kreston, *supra* note 62, at 39-40.

69. ESTES & WEINER, *supra* note 1, at 160-67.

70. Professionals working for the two types of organizations were asked to rank a list of ten factors. *Id.* at 166, 192. Law enforcement agencies ranked poverty sixth and services agencies ranked law enforcement fourth. *Id.* at 192. Both groups ranked advocacy and awareness second and law enforcement agencies ranked federal law enforcement third. *Id.*

71. Liberals worry that the adolescent is too immature to consent to sex with more experienced adults. Feminists caution that the adult man might exploit the youth, deploying his superior status to pressure the youth into premature sexual activity. The American gayocracy has feverishly distanced itself from man-boy love. In short, everyone assumes that adult-minor sex is normally predatory on the part of the adult and harmful to the minor.

ESKRIDGE, *supra* note 44, at 264.

72. "Law constitutes bargaining power in the sense that the content of the background rules conditions the outcome of the conflict." DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 105 (1993).

fact that the sovereign orders or prohibits acts on pain of a sanction."⁷³ I say this because reformers' visions are limited to improving the effectiveness of catching and sanctioning the criminal and delivering services to the crime victim. Our understanding of youth prostitution would be enhanced, I contend, by adopting "the perspective of the student of private as opposed to criminal law, whose main pre-occupation is with how courts and legislatures, by defining and administering contract, tort, . . . property [and, I would add, family law] rules, influence the vast range of conduct that criminal law neither compels nor forbids."⁷⁴

This perspective evolved early in the twentieth century, during an era of struggle and reform in the industrial labor market.⁷⁵ The legal realist Robert Hale wrote a landmark essay in 1923 entitled *Coercion and Distribution in a Supposedly Non-Coercive State*.⁷⁶ Hale wrote in opposition to conservative economists who used the language of "freedom" and "coercion" to advocate for minimal state regulation of the wage-labor market.⁷⁷

Referring readers to the law of property, Hale asked, "[w]hat is the government doing when it 'protects a property right'? . . . [I]t is forcing the non-owner to desist from handling [the thing owned], unless the owner consents."⁷⁸ The non-owner, therefore, has a *legally enforceable duty to abstain* from infringing on the owner's "sole right to enjoy the thing owned."⁷⁹

"The owner [, however,] can remove the [non-owner's] legal duty," by, for example, providing a wage on the condition that the non-owner work "for the owner at disagreeable toil."⁸⁰ Of course, the non-owner is under no legal duty to work for the owner on the owner's conditions, but

what would be the consequence of refusal to comply with the owner's terms? It would be either absence of wages, or obedience to the terms of some other employer. . . . Suppose, now, the worker were to refuse to yield to the coercion of any employer He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that is the law of property. . . . Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in any settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property.⁸¹

73. *Id.* at 119.

74. *Id.*

75. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 195-98* (1992) (explaining the significance of Hale's analysis and its historical context).

76. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

77. "[L]aissez-faire [is] in reality permeated with coercive restrictions on individual freedom," Hale asserted, and government "cannot avoid interfering with economic matters." *Id.* at 470. See also HORWITZ, *supra* note 75, at 195-98.

78. Hale, *supra* note 76, at 471.

79. *Id.* at 472.

80. *Id.*

81. *Id.* at 472-73.

Hale's chief analytical victory was his refutation of the reigning notion among laissez-faire economists and classical legal thinkers that the right of the owner and laborer alike to bargain without governmentally imposed terms was equivalent to an absence of coercion.⁸² He explained how the law of property, operating unnoticed in the background, enables private coercion of the non-owner by the owner, in spite of their formally equal status: "It is the law of property which coerces people into working for factory owners"⁸³ by framing the *alternatives* available to non-owners—limited in this case to starvation.⁸⁴

The relevant piece for my purpose here is the importance of *background rules*, which do not directly prohibit youth prostitution or its incidents, but which nevertheless influence a youth's decision by limiting the *alternatives* available to kids. Laws prohibiting trafficking, prostitution, solicitation, and sex between adults and minors operate in the foreground, but a realist analysis of youth prostitution ought to confront the background rules as well.

Consider, for example, some of the laws that govern where kids sleep. To begin with, American law maintains a clear preference for kids to be under the control of their parents. Parental autonomy, an incident of family privacy, was elevated to the level of constitutional principle coincidentally around the same time that Hale and other legal realists were busy critiquing the public/private distinction in the context of government regulation of the industrial labor market.⁸⁵ The flip side of parental autonomy, of course, is that parents are expected to support their children and may not abandon them.⁸⁶

When parents have been found unfit to carry out these duties, the foster care system provides alternatives, including removal of kids from their original homes and placement in foster care or another planned living arrangement,⁸⁷ though it is

82. See *id.* at 471. "It is because the word 'coercion' frequently seems to carry with it the stigma of impropriety, that the coercive character of many innocent acts is so frequently denied." *Id.* See also HORWITZ, *supra* note 75, at 195-98.

83. Hale, *supra* note 76, at 473. A complete discussion of Hale's analysis would explain that the employer, too, is "coerced." See *id.* at 474.

84. See KENNEDY, *supra* note 72, at 96-100.

85. The cases typically cited as foundational are *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923), in which the Court found that a Nebraska law prohibiting even parochial school education in any language other than English violated the Due Process Clause of the Fourteenth Amendment because it interfered with the right of parents to direct their children's educations, and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 521 (1925), in which the Court invalidated an Oregon law making public education compulsory on the same grounds.

I have noted elsewhere that the realist critique of the public/private distinction, which evolved in the context of regulation of the labor market, was not applied to the family until sixty years later. See Libby S. Adler, *Federalism and Family*, 8 COLUM. J. OF GENDER & L. 197, 227-29 nn.114 & 116 and accompanying text (1999).

86. See, e.g., MASS. GEN. LAWS ANN. ch. 119A, § 1 (West Supp. 2002) ("[D]ependent children shall be maintained, as completely as possible, from the resources of their parents . . .") and MASS. GEN. LAWS ANN. ch. 273, §§ 1, 15 (West 2000) (providing criminal penalties for child abandonment).

87. The federal foster care statute can be found at Titles IV-B and IV-E of the Social Security Act, 42 U.S.C. §§ 620-28, 670-79a (2000).

not always a matter of consensus when the state is justified in taking on this role.⁸⁸ For example, family and juvenile courts have come down both ways on whether aggressively homophobic or transphobic parenting of gay or transgender kids, including seeking treatment of the child's "gender identity disorder" to avoid the "onset" of homo- or transexuality, amounts to emotional abuse,⁸⁹ with some courts deferring to parental judgment on such matters.⁹⁰

This legal response may account for the disproportionate number of gay and transgender youth who run away from home.⁹¹ Running away is illegal,⁹² but suppose a kid does so anyway. Sleeping on the street or in a park is generally prohibited.⁹³ Youth shelters may be available in some areas, but those that receive federal funds must report the whereabouts of youth to their parents within seventy-two hours.⁹⁴

A kid could avoid shelter rules if he or she simply got a job and signed a lease to live in an apartment, but even if he or she somehow acquired the job skills adequate for self-support, the laws that govern child labor and a minor's capacity to enter into a contract erect additional obstacles. Federal and state statutes restrict youth access to work by restricting the hours, as well as the conditions, e.g., non-

88. The history of American child welfare policy, in my view, is a history of conflict between two clusters of values regarding the justifiability of state intrusion into family life. Some reformers have rallied around the protection of children and the promotion of a set of universal standards governing child rearing. These values have been used to justify aggressive state interventions into families. They have vied against rival values such as family privacy, parental autonomy, and cultural and religious diversity, which weigh against intervention in families and in favor of increased tolerance of a broad range of parenting behavior. See Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1 (2001).

89. See Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 458-68 (1998); Sonia Renee Martin, Note, *A Child's Right To Be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 179 (1996).

90. Martin, *supra* note 89, at 191.

91. See *id.* at 176.

92. MASS. GEN. LAWS ANN. ch. 119, §§ 21, 39H (West 2000) (defining "child in need of services" and permitting the arrest of such a child, respectively).

93. See, e.g., MASS REGS. CODE tit. 350, § 2.01(2)(b) (2002) ("No person is allowed on [Metropolitan District Commission] Reservations except during the hours from dawn to dusk unless specified otherwise at the site, or by permit.").

94. Office of Human Development Services, Department of Health and Human Services, 45 C.F.R. 1351.18(e) (2001). For a state variation, see, e.g.,

A temporary shelter . . . may, for a seventy-two hour period, provide temporary shelter to a child under eighteen without parental consent, provided that the child's welfare would be endangered if such shelter were not immediately provided. At the expiration of such seventy-two hour period, the [shelter] shall (1) secure the consent of the parent or guardian to continued custody or care, (2) refer the child to the department [of Social Services] for custody or care, or (3) refuse to provide continued care and custody to said child.

Ch. 119, § 23(6).

To be clear, these rules govern temporary shelters, as opposed to long-term residential facilities licensed through the state's foster care system. See, e.g., Gay and Lesbian Adolescent Social Services (GLASS), *Residential Group House*, at <http://www.glassla.org/ResidentialGhome.htm> (last visited Sept. 3, 2002) (on file with the Maine Law Review) (describing group homes run by GLASS in Los Angeles, California).

hazardous, under which kids under the age of sixteen are permitted to perform labor.⁹⁵

Minors can enter contracts—they are not void *ab initio*—but in most cases, those contracts are *voidable* by the minor.⁹⁶ This is known as the “power of avoidance,” or “of disaffirmance” and it resides exclusively with the minor; an adult party may not void a contract on the grounds that the other party is a minor.⁹⁷

To some observers it has seemed that the infant has capacity to contract coupled with an additional power of disaffirmance. It has been said that “the law confers a privilege rather than a disability.” This, however, represents but one side of the coin. Adult parties frequently will refuse to contract with or sell to infants because an infant is incapable of giving legal assurance of non-disaffirmability. From this point of view the infant is under both a legal and practical disability.⁹⁸

If the minor lives in a state with an emancipation statute, he or she may be able to obtain a declaration that vests him or her with certain adult capacities, including the capacity to contract.⁹⁹ “Such advantages are accompanied, however, by other less convenient . . . consequences of majority, such as the inability to require parental financial assistance,”¹⁰⁰ or, as one kid put it, “if I want to go back home and abide by the rules they don’t have to let me back in.”¹⁰¹

Kids need to sleep somewhere. Sometimes they sleep in the street or in the park, but when it’s cold, at least some of them are going to feel the need for money or a person willing to take them home for a price.¹⁰² Contract law, rules governing youth access to housing and employment, and longstanding constitutional doctrine providing for parental rights or the alternative of *parens patriae* (as well as their construction by judges who may not see aggressively homophobic or transphobic parenting as abusive) establish the conditions under which youth who are homeless, poor, and possibly fleeing abuse submit to survival sex. A sophisticated and thorough legal analysis should consider these and possibly other back-

95. See Andrea Giampetro-Meyer & Timothy S. Brown, S.J., *Protecting Society from Teenage Greed: A Proposal for Revising the Ages, Hours and Nature of Child Labor in America*, 25 AKRON L. REV. 547, 555-63 (1992).

96. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS Vol. I § 4.4 (2d ed. 1998); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 8.2 (4th ed. 1998).

97. CALAMARI & PERILLO, *supra* note 96, § 8.2, at 281.

98. *Id.* (quoting SIMPSON, CONTRACTS § 216 (2d ed. 1965)). But see Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”: From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 510-14 (1994) (arguing that the doctrine has been eroded statutorily—in the context of promissory notes for educational loans, for example—and that this trend forebodes the doctrine’s eventual demise).

99. See Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 245 (1992). This is not necessarily the case in a jurisdiction that employs a common law emancipation doctrine. See *id.*

100. *Id.* at 246.

101. *Id.*

102. Street kids identify more flexible long- and short-term housing options as one of their key needs. See ESTES & WEINER, *supra* note 1, at 63.

ground rules¹⁰³ along with the foreground rules discussed in Part III. This becomes especially manifest once we reflect on the fact that *youth prostitution is illegal*—i.e., kids *break* the foreground rules.

B. Youth Agency

Not all youth who prostitute themselves, however, do so to survive; not all are homeless and destitute. As discussed above, some kids exchange sex for video games, jewelry, or other decidedly unnecessary items. This section discusses a second conceptual failure, one that makes it difficult to remember that this second group of kids exists. This conceptual failure runs deeper, beneath many of the background rules discussed above as well as the foreground rules concerning the age of consent. These rules come from somewhere: that somewhere is an ideology concerning the extent of youth agency; this ideology contains some apparent contradictions and it has not been fully examined.

Observe, for example, that although youth under a certain age lack the legal capacity to consent to sex, they nonetheless can be held criminally liable for the offense of prostitution.¹⁰⁴ Progressives in law enforcement now advocate targeting the adults involved on the grounds that the kids are merely their innocent victims.¹⁰⁵ Still, youth can be held liable, in some instances as juveniles and in some as adults, for the full range of criminalized activity, from car jacking to sexual assault.¹⁰⁶ In fact, kids living on the street in despair commit all sorts of offenses, such as theft and drug dealing,¹⁰⁷ not just prostitution, but the rhetoric of the exploited innocent does not predominate in these contexts.

In one moment, youth are imagined to be innocent victims exploited by adult predators. In the next, they are accorded total agency, held to the same standards as adults. This is not simply a matter of segregating sex from other spheres of action; even within the domain of sexual activity, the contradictory images coexist.¹⁰⁸

I am *not* heading toward an argument that youth ought to be understood consistently, either as innocents or as fully formed, autonomous sexual bargain-seekers. I do not believe that either image could possibly capture the complex, on-the-

103. Housing law that applies peculiarly to kids is just one example, albeit perhaps the most salient one. State laws also limit minor access to medical care by limiting their ability to consent to certain procedures, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12F (West 1996) (providing exceptions to the general rule), and again, limiting their ability to acquire money. For transgender kids interested in sex reassignment surgery, or pregnant kids seeking an abortion, see *id.* § 12S (governing access to abortion), it is easy to imagine how these laws create additional conditions that might influence a minor's decision to sell sex.

104. As William Eskridge observed, the same teenage girl who lacks capacity to consent to intercourse also "has a constitutional right to use contraceptives." ESKRIDGE, *supra* note 44, at 248 (citing *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1979)).

105. See *supra* text accompanying notes 56-70.

106. Similarly, youth can enter contracts, but assert incapacity as a defense. See *supra* notes 96-97 and accompanying text. Youth can find refuge in homeless shelters, but only for three days. See *supra* note 94 and accompanying text. On the flip side, parents are entrusted to raise and discipline their children, except when they are not. See *supra* notes 86-90 and accompanying text.

107. See Auerswald & Eyre, *supra* note 28, at 1503.

108. This is not necessarily peculiar to kids. The idea that women need special protection from the law vies against women's agency, as well. See, e.g., ESKRIDGE, *supra* note 44, at 245.

ground reality of youth sexual decision making.¹⁰⁹ The apparent availability of only these *two* contradictory options is what I find troubling.

One reason to be troubled is that a thorough analysis of the many conflicting rules attributing or denying agency to youth might not yield any coherent basis upon which policy makers over the years have chosen between the two options when deliberating on one policy matter or another—i.e., this might be a good example of the indeterminacy of law.¹¹⁰ Indeterminacy is important because we might find further that some political agenda we oppose has been too easily served by the readiness of the imagery to flip this way or that, from exploited innocent to fully formed, autonomous sexual bargain-seeker or *vice versa*.

This would be a worthwhile study, but I do not undertake it here. In this section, I am concerned instead with the fact that the two options leave a group of kids unknowable, invisible, forgotten. Neither the exploited innocent nor the fully formed, autonomous sexual bargain-seeker is up to the theoretical task of framing the phenomenon of youth prostitution once we confront its diversity.

Several years ago while volunteering at a youth center, I met a handsome, teenage boy, "Michael." Michael was a top student at a prestigious, Boston area prep school applying to Ivy League colleges. He lived with his well-to-do parents in an upscale neighborhood and hung out sometimes at "the pit," an area in the heart of Harvard Square known to be populated by homeless and other outsider kids.¹¹¹ One day, Michael reported to me that he recently had been approached near the pit by a man, unknown to him, and invited to get into the man's car and drive around for awhile. Michael was suggestive, but vague on the details of their time together, but he told me that at the end of the evening the man took him to a Harvard Square bookstore and bought him a book.

I was dumbstruck by Michael's decision to get into the car—Michael's bourgeois parents surely taught him not to get into cars with strangers—and so I asked him why he did it. He shrugged, demonstrating little insight into his own behavior, and said that he was bored.

I don't know what explains Michael's decision to get in the car, but I know what doesn't: this was no desperate exchange. This was not a kid who had to risk his safety to get books.

If your impulse is now, as mine was then, to explain Michael's behavior by simply readjusting the scope of the word "despair" beyond food and shelter to include emotional need—i.e., perhaps Michael's parents did not fulfill his need for parental love and he was looking desperately for it in a strange man—I ask you to set that impulse aside for the time being. That *might* explain Michael's decision, but it might not, and I think there is something telling about us in the urge to believe that it does.

109. These images probably do not describe the reality of most adult sexual decision making particularly well, either.

110. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 245 (1987) (explaining the clearest version of the indeterminacy argument as a "demonstrat[ion] that apparently similar social conditions have generated disparate legal responses").

111. See Dorie Clark, *Freaks and Geeks: Harvard Square 'Pit' Under Scrutiny After Killing*, BOSTON GLOBE, CITY WEEKLY, Nov. 18, 2001, at 1. Although the pit is sometimes idealized by the kids who hang out there ("Everybody here gets along. There's no prejudice—nothing."), the pit gained notoriety last year when a homeless girl was murdered, allegedly by other young people recruiting in the pit for their gang. *Id.*

Consider a scene from Massachusetts in the 1970s, describing activity in a house that was eventually raided by the police:

Boys flocked to the three-story, wood-shingled house on Mountain Avenue in Revere for the teenage version of the Holy Grail: an endless supply of beer and weed. Being drunk and stoned made everything—from the air hockey to the movie watching—significantly more enjoyable. There was also money to be had. The pocket cash came from the local men, who especially liked it when the local boys (hustlers, gay teens, straight teens) lounged around the house with their shirts off. Then there were smiles all around.

There was also sex. The boys had sex with each other. The boys had sex with the men. All of this was done quietly, because neighbors would later say that they didn't see or hear anything unusual coming from the house.¹¹²

The facts available to us in this scenario as well as in Michael's tale may be less than complete, so we can only extract so much from them. Both stories at least raise the possibility, however, that the reality of the relationships were more elusive than adult predation and child exploitation. Nothing we know from these accounts lends itself to the impression that these boys were desperate for food or shelter. We could jump to the presumption of a deficit of parental love, but before we do, isn't it worth it to ask whether it's the evidence of something else prompting us in that direction? The facts as they appear in each story suggest to me that the youth wanted, rather than needed, something. It might have been pot, a book, or an adventure. It might even have been the sex.

As discussed in Part II, youth sell sex to adults in varying contexts, for varying kinds of consideration, and with varying degrees of desperation—maybe even with varying senses that they are engaged in a trade at all. Estes and Weiner, the empiricists who collected much of the data cited in Part II, state this explicitly, identifying kids who sell sex *for pleasure* and describing middle-class kids who live at home and trade sex for luxury items such as video games and jewelry.¹¹³ Then, almost as if they have not read themselves, they use the term “survival sex” interchangeably with youth prostitution,¹¹⁴ suggesting that kids sell sex only to survive. They go on to propose reforms, the bulk of which go directly to assisting youth who are living in despair, barely acknowledging that youth living in all sorts of circumstances sell sex—a fact they themselves discovered. Even the title of their study, *The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico* is unmistakable on this point—notwithstanding their own data demonstrating the variety of contexts in which youth prostitution occurs and the variety of motives to which it can be attributed.

My own instinctive reaction is similar: protective, horror-stricken. But I have another concern, as well. The certainty, even absentmindedness, with which we

112. Benoit Denizet-Lewis, *Boy Crazy*, BOSTON MAGAZINE, May 2001, at 105. When the police raided the house, two organizations sprung up to defend the adults involved, the North American Man-Boy Love Association (NAMBLA), an organization of some disrepute, and Gay and Lesbian Advocates and Defenders (GLAD), a leading civil rights organization in Boston. *Id.* at 106. Estes and Weiner name NAMBLA as an example of an organization that advocates adult sexual encounters with children, something they cite as a possible causal factor in child exploitation. See ESTES & WEINER, *supra* note 1, at 41.

113. *Id.* at 61.

114. See *id.* at 11.

recite the exploited innocent trope makes it difficult to see those kids for whom the trope rings hollow.

Earlier this year, Professor Harris Mirkin of the University of Missouri provoked a clamor of condemnation that prompted the Missouri legislature to penalize the state university's budget by the approximate amount of Mirkin's salary when it was discovered that he published an article referring to the "panic" over pedophilia and suggesting that the image of the innocent child ought to be critically reassessed.¹¹⁵ Similarly, journalist Judith Levine has been the object of alarmist attacks¹¹⁶ for a new book in which she contends that "sex is not ipso facto harmful to minors; and America's drive to protect kids from sex is . . . often harming them."¹¹⁷

The demonization of these less than revolutionary figures strikes me as symptomatic of the same syndrome that makes it so easy to forget about Michael and the boys in Revere. Though perhaps more enlightened and good-willed than the Missouri legislature, reform-minded people of both the law enforcement and human services mindsets are trapped. There seem to be only two options for conceptualizing youth who have sex: they are either exploited innocents or fully-formed, autonomous sexual bargain-seekers. When we look down the autonomy road we see an insanely libertarian position, one that accords absolute agency and liability to kids for their sexual bargains: a ridiculous conclusion in the context of youth prostitution, especially when we contemplate the desperate exchange of survival sex. But we have only one other conceptual option: the exploited innocent. Mirkin and Levine refuse to acquiesce to the notion of the exploited innocent, so it must be that they subscribe to its opposite. Hence, they deserve our condemnation. Michael and the boys in Revere were not fully formed adults whom we are prepared to credit with absolute agency, so they must be exploited innocents. There seem to be only two.

In Part IV. A, I proposed that legal realism had something to contribute to our understanding of youth prostitution by expanding the field of vision beyond criminal prohibitions to the background rules governing youth access to housing and the extent of youth capacity to contract. Now I want to suggest that critical theory has something to offer. The "only two" problem is a feature of a particular way of understanding law, and we can expand our options by understanding law differently.

Proscriptions against sex with minors, corruption of minors, and so on, do more than prohibit—they *produce*. Explaining the work of Michel Foucault, Judith Butler

points out that juridical systems of power *produce* the subjects they subsequently come to represent. Juridical notions of power appear to regulate political life in purely negative terms—that is, through the limitation, prohibition, regulation, control and even "protection" of individuals . . . through the contingent and re-

115. Richard Cohen, Editorial, *A Sex Abuse Panic?*, WASH. POST, May 3, 2002, at A27. Mirkin's article appeared in 37 J. HOMOSEXUALITY, No. 2 (1999).

116. Cohen, *supra* note 115, at A27.

117. JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX, at xxxiv (2002). Suitably, Dr. Joycelyn Elders, President Clinton's short-lived Surgeon General, wrote the forward. Dr. Joycelyn M. Elders, *Forward* to JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX, at ix (2002).

tractable operation of choice. But the subjects regulated by such structures are . . . formed, defined, and reproduced in accordance with the requirements of those structures.¹¹⁸

Reformist discourse that revolves around an image of an exploited innocent, and insists on the utter rejection of its opposite, does more than protect innocent children from exploitation. It *produces* our impulse to protect innocent children from exploitation. Indeed, for each instance of youth sex we are forced to ask, Was this child an exploited innocent or a sexual agent?,¹¹⁹ because these are the options that the discourse provides. Reformers of both the law and order and human services persuasions are caught up in a discourse that is singularly devoted to the innocent child to the absolute exclusion of its rival, the young sexual agent. But this does little to help us understand what was going on in that house in Revere. Our limited choices produce our understanding of that house as one of exploitation and of the boys as its innocent victims. This "only two" approach blinds us to the multiplicity, perhaps spectrum, of dynamics involved in youth prostitution, and youth sex more generally.

This is not an argument for abandoning all laws aimed at protecting youth from sexual predation. This is an argument for increased cognizance of law's effect on our consciousness and, in turn, the power of our consciousness to shape law. Trudging through the on-the-ground reality of youth sex along the axis of agency would be a highly context-driven enterprise and is more than can be done in this essay. I do not assert here a new rule of thumb or even offer any criteria or guidelines. My proposal is limited to this: we should try to be more cognizant of the spectrum that lies between the exploited child and the fully-formed, autonomous sexual bargain-seeker and also of the way in which even the best-intended reformist discourse drives us again and again into the corners.

I do not know what is the appropriate legal response, if any, to a situation such as Michael's or the one in Revere. What I submit, however, is that the myriad of conflicting rules governing youth capacities are born of, but also reproduce, a kind of tortured ambivalence about youth agency, one which has set up a discursive struggle between rival images of youth, neither of which is adequate to the task of understanding youth, and which, unexamined, might inappropriately drive legal responses in complicated cases that would be better understood as falling along a spectrum.¹²⁰

118. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 2* (1990) (citing MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I, AN INTRODUCTION* (Robert Hurley trans., 1980)).

119. This is close to a point made by Mary Joe Frug in the context of the regulation of adult prostitution. "Like other rules regulating sexual conduct, anti-prostitution rules sexualize . . . female bodies. . . . They invite a sexual interrogation of every female body: Is it for or against prostitution?" MARY JOE FRUG, *A Postmodern Feminist Legal Manifesto*, in *POSTMODERN LEGAL FEMINISM* 131-32 (1992).

120. My argument here might be best understood as "pro-sex" because it arises in part out of concern that

the postulation of a normative sexuality that is 'before,' 'outside,' or 'beyond' power [or exploitation, in the language typically used in the context of minors] is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities for sexuality and identity within the terms of power itself.

BUTLER, *supra* note 118, at 30. This should not be taken to mean that I approach youth prostitution as morally neutral. "[T]o operate within the matrix of power is not the same as to replicate uncritically relations of domination." *Id.*

V. CONCLUSION

This essay was born of two impulses that felt at the outset as though they were working against one another. I have tried nonetheless to satisfy both here.

First, the thought of kids making themselves sexually available out of a desire to survive rather than a desire to have sex is haunting. I oppose neither the provision of social services to despairing youth nor arrest and prosecution of adult sexual predators, and in fact I hope to have contributed something small to strategic thinking about these kids by highlighting some of the background rules that affect their choices. Increasing the amount of attention that we devote to the background rules may have the added benefit of evening out the discursive force of the background and foreground rules. It is in the foreground, after all, where agency is assigned and punishment meted out, and therefore the place where the exploitation trope holds the most sway and relations such as the ones in the Revere house are concealed. By shifting attention to the circumstances in which youth make their sexual decisions (e.g., whether they have a safe place to sleep), a fuller and more representative picture may be revealed.

This brings me to the second intuition pursued in this essay. The depth of pain for youth in despair makes those instances that might be about something other than despair all the more mystifying and challenging to contemplate. I confess to not having gone the distance of offering a concrete policy proposal for dealing with these more complicated instances of youth prostitution. I offer only the microstep of trying to make them a little bit more visible. If we pry our fingers loose from the edge of the exploited innocent, it is not a foregone conclusion that we will go crashing down toward the fully-formed, autonomous sexual bargainer. I advocate only that we find the guts to take in the more complicated landscape.

My argument might also be understood as an example of "queer theory" because it "accepts . . . that status [such as the status of being a minor] and choice are related," (i.e., I am not unconcerned about Michael's youth,) "but challenges the productivity of state sex regulation, not because it deprives people of liberty, but because it creates . . . [a] sexual closet . . . [for Michael] and . . . threatens to perpetuate sexuality as a predominantly negative rather than positive experience" for kids like him. ESKRIDGE, *supra* note 44, at 244.