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INVISIBLE TARGETS: JUVENILE PROSTITUTION, CRACKDOWN LEGISLATION, AND THE EXAMPLE OF CALIFORNIA

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“The history of what constitutes crime is the story of how society creates its enemies through social policies and political forces.”¹

I. INTRODUCTION

A person can legally consent to sex at the age of eighteen in California.² All states designate a minimum age at which having sex qualifies as statutory rape.³ Like most states, California also has laws against

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¹ Laurie Schaffner, *Hawkins' Delinquency and Crime*, 41 BERKLEY J. SOC.: CRITICAL REV. 183, 187 (1996) (reviewing J. DAVID HAWKINS, *DELINQUENCY AND CRIME* (1996)). Hawkins' book represents a collection of some of the most current pieces on social theory of juvenile delinquency, with most embracing the “conservative range on a continuum of criminology theory.” *Id.* at 185.

² CAL. PENAL CODE §261.5(a) provides:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age.

CAL. PENAL CODE §261.5(a) (1999).

³ See, e.g., ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438 (West, WESTLAW through 2002 Replacement set); ARIZ. REV. STAT. ANN. §§ 13-404, 13-1410 (West, WESTLAW through 45th Legis., Reg. Sess.); ARK. CODE. ANN. §§ 5-14-103, 4-14-104 (West, WESTLAW through 2002 Extraordinary Sess.); COLO. REV. STAT. ANN. §§ 14-2-106 (West, WESTLAW through 2002 Second and Third Reg. Sess.); CONN. GEN. STAT. § 53a-73a (West, WESTLAW through Jan. 6, 2003 Special Sess.); DEL. CODE. ANN. Tit. 11 §§ 768, 770, 762, 1108 (West, WESTLAW through Oct. 10, 2002 Exec. Sess.); FLA. STAT. ANN. §§ 794.05, 794.011, 800.04 (West, WESTLAW through 2002 Regular Sess. and 2002 Special Sess.); GA. CODE. ANN. §§ 16-6-3, 16-6-4 (West, WESTLAW through 2002 Regular Sess.); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65 (West, WESTLAW through 2003 Legis.); 18 PA. CONS. STAT. ANN §§ 3121, 3122.1, 3123, 3125 (West, WESTLAW through Act 2002-139); TENN. CODE ANN. §§ 39-13-506, 39-13-504, 39-13-522 (West, WESTLAW through 2002 Second. Reg. Sess.); VA. CODE ANN. § 18.2-61 (West, WESTLAW through 2002 Reg. Sess.); 18 U.S.C. § 2243(a) (2002).

prostitution, for which minors and adults alike are subject to criminal sanctions for soliciting or engaging in any act that it proscribes.⁴ A contradiction arises where juveniles are arrested, prosecuted, and incarcerated for having sex for money or other consideration under the same penal code that declares they have no legal capacity to consent to sex at all. If minors are incapable of sexual consent, how does the legal community justify punishing them for their commercial sexual exploitation?⁵ This article will focus on female, child prostitutes who are arrested, prosecuted, and incarcerated under laws such as California Penal Code section 647 for disorderly conduct, and viewed as wrongdoers from whom the public needs protection.⁶

California Penal Code section 647 defines "disorderly conduct" and subsection (b) embraces prostitution in its definition. It reads, in full, as follows:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person who agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests acceptance of an offer or solicitation to engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration."⁷

Like all criminal law, the law of prostitution as disorderly conduct is

⁴ CAL. PENAL CODE §647(b) (1999); *see also* In re Elizabeth G. 53 Cal. App. 3d 725, 126 Cal. Rptr. 118 (1975); In re Cheri T., 70 Cal. App. 4th 1400, 83 Cal. Rptr. 2d 397, 1405, 1407 (1999).

⁵ The term "commercial sexual exploitation" is used interchangeably throughout this article with "child prostitution" (and "child prostitute" as the subject) throughout this article. Both terms indicate the meaning that international law gives to them, refuting any notion that a child voluntarily participates in prostitution; rather the responsibility belongs only to the exploiters of these children. *See* Christianna M. Lamb, *The Child Witness and the Law: The United States Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, OR. REV. INT. L., 63, 88 (2001).

⁶ A strong relationship exists between victimization, prostitution and women's crime in the United States. MEDA CHESNEY-LIND, *THE FEMALE OFFENDER* 139-41(1997). Major studies indicate that girls' clear reasons for engaging in "survival sex" continue into adulthood. *See id.* One jurisdiction found that 88% of its adult female offenders were involved in prostitution at some point, and another found the majority to fall into one of two categories, one of which constituted "street women" (those who were sexually abused, ran away as girls, and got involved in prostitution). *Id.* at 140-41.

⁷ § 647(b).

written with the purpose of protecting the public at large from dangerous elements in society.⁸ The law, therefore, does not consider prostitutes part of the "public" that needs protection, but rather those elements in society that the public needs protection from. California Penal Code § 647(b) makes societal enemies out of the people who engage in prostitution. The net the section 647(b) casts, however, also captures girls who run away from abusive homes who end up in a street economy, where survival though survive al exploitation appears as a better option than their home life.⁹

II. PURPOSE

This article critically examines a contradiction in section 647(b) that also exists in other similar state laws in the United States as well as its consequences on children who are commercially sexually exploited. Even though prostitution laws, such as California Penal Code § 647(b), apply to minors and adults alike, the laws cannot be reconciled with statutory rape laws that define the age of consent.¹⁰ This paper explores the issue of whether children who are commercially sexually exploited should be punished under criminal statutes prohibiting prostitution, even though the children prostitutes fall below the age at which they have a legal capacity to consent to sex. Since statutory rape laws make it impossible for a juvenile to consent to any sex act, it is inappropriate to apply § 647(b) and similar anti-prostitution laws against them. Children who are bought and sold into prostitution need legal protection, and should not be punished as criminal perpetrators.

III. BACKGROUND

The laws against solicitation and prostitution punish individuals who need legal protection the most. When a child living in an abusive home finds no recourse in the legal system and society at large, the child usually runs away and enters the street economy to survive.¹¹ Statutes such as section 647(b) criminalize juveniles and view prostitution neither as sexual

⁸ See Enacts the Protection Abatement and Neighborhood Protection Act of 1996, Assem. Comm. on Pub. Safety Bill No. AB 2949 (Ca. 1996), available at WL, California Legislative History & Bill Tracking, California Committee Analyses File [hereinafter Protection Abatement Comm. Analysis] (as stated in Expressed Purpose of the Bill).

⁹ See generally Press Release, University of Pennsylvania News Bureau, Commercial Child Sexual Exploitation: "The Most Hidden Form of Child Abuse," Says Penn Professor (Sept. 10, 2001), available at <http://www.upenn.edu/pennnews/releases/2001/Q3/restes0901.html> (last visited: May 29, 2002) [hereinafter U. Penn. Press Release].

¹⁰ Case law indicates that section 647(b) applies to juveniles. See, e.g., *In re Cheri T.*, 70 Cal. App. 4th 1400, 83 Cal. Rptr. 2d 397, 1405, 1407 (1999).

¹¹ FAEDRA LAZAR WEISS, ET AL., PREVENTION AND PARTY: GIRLS IN THE JUVENILE JUSTICE SYSTEM, 1996 OFFICE OF JUV. JUST. & DELINQ. PREVENTION, GIRLS, INC., 1, 27 (1996); CHESNEY-LIND, *supra* note 6, at 139-41.

exploitation nor a survival strategy, but rather a voluntary act that violates the law.

Children who are arrested for prostitution will likely end up in a juvenile justice system that is ill-equipped to meet their needs, often perpetuating the cycle of abuse that led them to the wrong side of the law in the beginning.¹² Although the goal of juvenile justice system is to rehabilitate its detainees, it does little more than punish and stigmatize individuals whose circumstances are irrelevant to it.¹³

The circumstances that make a juvenile into a child prostitute, however, are relevant. One example of this situation is the inability of minors to obtain employment without parental consent.¹⁴ The rate of arrest and incarceration for female juveniles is higher than that of their male counterparts and increasing at a higher rate.¹⁵ Girls account for one in four arrests of all juveniles.¹⁶ Although girls make up twenty-four percent of the juvenile justice system, they account for fifty-eight percent of juvenile arrests for running away, and fifty-six percent of arrests for prostitution.¹⁷ Over one million girls run away each year, two thirds of which become prostitutes.¹⁸ The majority of girls enter the system as status offenders (where a violation of law is found only if a juvenile commits the act, such as curfew violation, running away, and truancy), and so on), and non-violent offenders.¹⁹

According to recent estimates, thirty-four percent of all girls experience some form of abuse while they are still minors, but the percentage of girls with such a history is much higher for those within the juvenile justice system, ranging as high as seventy-three percent.²⁰ Eighty-five percent of child prostitutes have also suffered from rape, incest, or abuse before entering prostitution.²¹ Furthermore, unlike their male counterparts, girls in

¹² See generally *Child Prostitution*, Child Wise, at <http://www.ecpat.org/> (last visited Feb. 24, 2003).

¹³ *No Minor Matter: Children in Maryland's Jails*, Human Rights Watch 1 (1999), available at <http://www.hrw.org/> (commenting on the abandonment of the goals of rehabilitation of juveniles for the new approach of punishing them, by Federal and States).

¹⁴ *Nelly Velasco, Center for Young Women's Development: Street Survival Project*, available at www.bayswan.org/nelly.html. One child stated, "There was very much limitation . . . not being able to get a job because you have to have your parent's signature on the permit saying you are in school and living with your folks. I couldn't get a job, I couldn't get a place. I was just stuck. I didn't feel like there was any other choice [but to hustle] at that time." *Id.*

¹⁵ 91% of all girls arrested were adolescents—young women ages thirteen through seventeen. WEISS, *supra* note 11, at 3. Over 80% of child prostitutes are between the ages of fifteen and seventeen. Lamb, *supra* note 5, at 66.

¹⁶ WEISS, *supra* note 11, at 3.

¹⁷ Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 1999 National Report*, 1999 NAT'L CTR. FOR JUV. JUST./OFFICE OF JUV. JUST. & DELINQ. PREVENTION, at <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html> (last visited Oct. 23, 2002).

¹⁸ WEISS, *supra* note 11, at 5.

¹⁹ *Id.* at 27.

²⁰ *Id.* at 14.

²¹ Lamb, *supra* note 5, 66.

the system are found more likely to have histories of abuse trailing them; studies suggest that the girls are “running away from profound sexual victimization.”²² Girls who run from abusive homes are often arrested for prostitution because it is a primary means of survival in the street economy. Laws such as California Penal Code section 647(b) criminalize the survival strategies of abused young women and foreshadow their entry into the juvenile justice system, which is generally unsuccessful in redirecting girls’ lives for the better.

IV. DISORDERLY CONDUCT: WHO DOES THE LAW PROTECT

The law of disorderly conduct and its enforcement should be examined to assess whether it does in fact protect the public and work for the greater good of society to punish wrongdoers. California Penal Code section 647(b) originates from morality debates that underlie the California State Legislature’s decisions.²³ These discussions center on protecting the public from prostitutes and the secondary effects of prostitution through harsher sanctions.²⁴ Juveniles are often either vilified or lost in these debates.²⁵ Anti-prostitution laws are postured to protect everyone except those who are most in need of its protection, commercially sexually exploited children.²⁶

A. For “The Public”

The language of California Penal Code section 647(b) facially targets individuals who engage in acts of prostitution, and more recently, individuals who seek the services of a prostitute. Anyone who has the intent and acts in furtherance of prostitution is guilty of a misdemeanor in violation of section 647(b).²⁷ “The ordinary meaning of the statute is that all persons, customers, as well as prostitutes, who solicit an act of prostitution are guilty of disorderly conduct.”²⁸ The law of disorderly conduct, which encompasses prostitution, serves to protect onlookers who might be offended by what they see.²⁹ California Penal Code section 647(a), prohibiting lewd conduct, specifically punishes acts that occur in public view, but section 647(b) punishes both public and private acts of prostitution.³⁰

In either provision, the statute concerns how the public is affected by the act. California Penal Code section 647(b) defines prostitutes in terms of

²² CHESNEY-LIND, *supra* note 6, at 26-27.

²³ See Protection Abatement Comm. Analysis, *supra* note 8.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ § 647(b).

²⁸ *Leffel v. Mun. Ct. for Fresno County*, 126 Cal. Rptr. 773 (Cal. Ct. App. 1976).

²⁹ *People v. Fitzgerald*, 165 Cal. Rptr. 271 (Cal. Ct. App. 1979).

³⁰ *Id.*

the proscribed acts in which they are engaged. The provision's definition of "prostitute" or "act of prostitution" has been upheld as constitutional.³¹ In the eyes of law enforcement and the legal community, a prostitute is anyone who solicits or commits the act of prostitution, and "the public" consists of those who need protection from the immorality and harm that prostitutes bring.

1. Legislative History and Intent

Discussions in the California State Legislature represent the dominant discourse of prostitution as well as the intent of anti-prostitution legislation.³² Constituents whose views are exemplified by the Legislature articulate the fear that prostitution is an invasion by depraved individuals into otherwise wholesome communities.³³ Often prostitution and drug dealing are lumped together in arguments that focus on their removal from such communities that need legal empowerment to "crack down."³⁴ Prostitutes and drug dealers are seen as people who blatantly defy law enforcement in order to "adversely affect the safety, welfare, and health of our neighborhoods while hurting small businesses and decreasing property values."³⁵ They are seen as highly skilled persons in the context of their own shady businesses because they consistently elude arrest.³⁶

In 1995, before the Assembly Committee on Public Safety, proponents of crackdown legislation successfully argued the secondary effects of prostitution both graphically and in the abstract. They insisted that prostitutes attracted serial rapists into areas that they walked, discarded prophylactics on the street, and recruited children into prostitution.³⁷ There was perception that prostitutes "engender[ed] violence and fear," and "create[d] a destructive environment of lawlessness."³⁸ Proponents of the legislation advocated that children "deserve[d] to be safe in the neighborhoods in which they live[d], play[ed], worship[ped] and stud[ied]," but prostitution pose[d] an immediate danger to children, families, and

³¹ *People v. Caylor*, 6 Cal. App. 3d 51 (Cal. Ct. App. 1970); *People v. Weger*, 25 Cal. App. 2d 584, 591 (Cal. Ct. App. 1967). California case law provides that so long as the act of loitering is accompanied by "an evil purpose" or "sinister, wrongful or criminal import," it does not violate due process. The intent to prostitute is the requisite evil purpose that § 647(b) meets, making it constitutional. *Id.*

³² "Dominant discourse" includes popular thought, religious and moral doctrine, and the "winning" logic used to ratify bills as law in the context of section 647(b).

³³ *Cal. Comm. Analysis, April 4, 1995: Hearing on Assem. Comm. on Pub. Safety B. No. AB 1035*. Assem. Comm. on Public Safety, 1995 Leg. (Cal. 1995) (as stated in Purpose).

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Id.* (as stated in Background).

³⁷ *Id.* (as stated in Byproducts of Loitering and Prostitution).

³⁸ *Id.*

property.³⁹ Opponents of harsher sanctions argued for the legalization of prostitution and described the trade as “a victimless crime of consensual activity.”⁴⁰

In April 1998, the Assembly Committee on Public Safety presented a bill that increased the sentence enhancement provision of California Penal Code section 647(f) from three to ten years for those who prostitute themselves while knowing that they are HIV-positive.⁴¹ The threat that HIV-positive prostitutes posed in transmitting HIV to the public justified increasing their punishment. Later that year, Senate Floor Bill No. AB 1788 proposed to authorize judges to suspend or restrict driving privileges of persons using their cars to solicit or engage in prostitution within 1,000 feet of a private residence.⁴² The purpose of existing law cited was “to deter [out-of-area johns] from ‘cruising’ residential neighborhoods in search of prostitutes.”⁴³ Motor vehicles involved in this crime were declared a “public nuisance.”⁴⁴ This law intended to deter acts of prostitution in automobiles, to keep it away from residential neighborhoods, and “protect . . . children from the prostitution and solicitation activity that has invaded their residential area.”⁴⁵

2. The Broken Window Theory

The Broken Window Theory provides imagery and analogy to explain the increase in the penalty for violating California Penal Code section 647(b) with each additional offense in an effort to combat prostitution.⁴⁶ Generally, proponents of the progressive penalty were composed of communities that were concerned with maintaining the quality of life enjoyed by that stable residential neighborhoods. The idea behind the Broken Window Theory is that if a broken window in a building is left unrepaired, the public interprets the unrepaired state as indicative of abandonment. Following this line of thought, the public will then think that “breaking more windows costs nothing.”⁴⁷ The broken window symbolizes

³⁹ See Protection Abatement Comm. Analysis, *supra* note 8.

⁴⁰ *Id.* (as stated in Arguments in Opposition).

⁴¹ Prostitution is considered a misdemeanor, but anyone with a prior conviction of prostitution who prostitutes him or herself while knowing that s/he is HIV-positive is charged with the higher crime of a felony according to section §647(f), added in 1988. 2 B.E. WITKIN & NORMAN L. EPSTEIN, CAL. CRIM. L. § 870 (2d ed. Supp. 1999).

⁴² *Cal. Comm. Analysis, August 25, 1998: Hearing on S. Floor B. No. AB 1788, 1998 Leg., 1998.* (Cal. 1998).

⁴³ See Protection Abatement Comm. Analysis, *supra* note 8 (as stated in License Suspension).

⁴⁴ *Cal. Comm. Analysis, August 25, 1998: Hearing on S. Floor B. No. AB 1788, 1998 Leg., 1998.* (Cal. 1998).

⁴⁵ See Protection Abatement Comm. Analysis, *supra* note 8.

⁴⁶ *Id.*

⁴⁷ *Id.*

disorderly conduct that goes untended and prevent the community from preserving order and control.⁴⁸ The first broken window is like "the unchecked panhandler," whose presence signals to others that the neighborhood is troubled and conducive to criminal activity. Proponents of the legislation argued that the answer was removal: law enforcement should be empowered to "remove undesirable persons from a neighborhood."⁴⁹ With the support of the Committee on Moral Concerns, the Legislature enacted the crackdown provision to combat the "loitering prostitutes and johns, threatening pimps, public sexual activity, and discarded condoms" in the community.⁵⁰

B. An Invisible Target

"Lack of information [about economically and politically marginalized girls] has facilitated a spate of mean-spirited initiatives to control the lives (and especially the sexuality) of young girls, particularly African American and Hispanic girls, who are constructed as welfare cheats and violent, drug-addicted gang members."⁵¹ In their quest to protect society at large, the Anti-prostitution laws such as California Penal Code section 647(b) operate upon individuals. The statute assumes this objective will be furthered by incarcerating the prostitutes. What the Penal Code addresses is how to deal with an individual who threatens society with her sexuality, but does not problematize the harm posed to the individual prostitute by society, even where children are concerned.⁵²

1. The Parallel of Prostitution and Pornography

Prostitution laws fall into the same realm as pornography laws, in that they are centered on protection of the public from those who participate in the prostitution and pornography. Anti-pornography debates have traditionally argued on moral grounds. Andrea Dworkin, an author of the anti-pornography ordinances enacted in Minneapolis and Indianapolis, recounts the history of censorship and pornography in the United States.⁵³ She observes that most censorship has occurred based on a male obscenity perspective.⁵⁴ In other words, the debate against pornography is skewed

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Protection Abatement Comm. Analysis, *supra* note 8.

⁵¹ CHESNEY-LIND, *supra* note 6, at 2.

⁵² Prostitutes risk grave danger in their line of work. For instance, they are more susceptible to sexually transmitted diseases, rape, violence, and other threats that occur in streets or in a stranger's car or home. See U. Penn. Press Release, *supra* note 9.

⁵³ Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 8 (1985).

⁵⁴ *Id.*

toward moral concerns, where female sexuality embodies immorality.⁵⁵ At least one aspect of Dworkin's argument applies to prostitution: Debate and legislation needs to move away from morality and be redirected to consider actual harm to persons.⁵⁶ With regard to child prostitution, criminal statutes should not punish children whose bodies are exploited, but rather direct punishment solely to those who are powerful and solvent enough to pay for the use of those bodies at their will.

2. The Meaning of Submissive Behavior

As a result of discriminatory social practices, submission is often essential to the survival of those who are less powerful.⁵⁷ Submissive behavior becomes a mechanism for succeeding in an oppressive world, as opposed to an affirmation of one's agreement to an oppressive practice.⁵⁸ Prostituting is the submission of one's body to another in exchange for money or other consideration. Focusing on the criminality of this act, especially in the context of child prostitution, fails to see prostitution as an act of submission to another's will in exchange for survival. When prostitution is viewed from this perspective, it makes little sense to punish a submissive child and challenges criminal sanctions and makes crackdown enforcement uncomfortable.

3. Protection for whom?

Criminal law seeks to protect the public from dangerous elements. For the purpose of California Penal Code section 647(b), dangerous persons include those who sell their sex for money or other consideration because they pose a moral threat to others. The truism that prostitution is an act against the morality of society is rooted in society's assumptions about gender.⁵⁹ While misbehaved boys are typically seen as threatening society with violence, misbehaved girls are perceived to threaten society's moral standards with their sexuality.⁶⁰ The image of a prostitute is young and female. It operates on a broad social spectrum, from popular culture to the collective conscience of law enforcement.⁶¹ Thus it is not surprising that girls

⁵⁵ *Id. passim.*

⁵⁶ *Id.* at 24.

⁵⁷ *Id.* at 15-16, 19-20.

⁵⁸ *Id.*

⁵⁹ WEISS, *supra* note 11, 1.

⁶⁰ *Id.* (noting also that "girls are disproportionately arrested for being somewhere other than where adults determine they ought to be").

⁶¹ "Arrest statistics may represent both actual gender differences in rates of offense and differences in the way society responds to male and female juvenile offenders." WEISS, *supra* note 11, at 3. For instance, police may turn away from arresting more girls for prostitution because they believe it is to be expected of them, whereas boys may be arrested more because prostitution is seen as more deviant when a male sells himself. *See id.* In the same way that girls

are targeted and constitute a disproportionate percentage of arrests for prostitution.⁶²

a. Who is "The Public?"

California Penal Code section 647(b) attempts to shield the public from girls who prostitute themselves. However, who is the public? Girls who survive abuse are revamped as perpetrators of crime. Section 647(b) requires their prosecution, so that the state is their professional adversary on behalf of the people. Yet the children prostitutes are vulnerable bodies—open to the dangers of the streets and strangers' cars and homes. The values that are championed by prostitution laws represent the protection of a public who appears privileged, white, and middle class.⁶³

Even if we overlook the fact that the California Legislature is disproportionately white, male, and privileged, it is nonetheless apparent that the value system upheld is centered on their understanding of child prostitution. The California Legislature affords sympathy or hostility based on its ability to relate to prostitutes. Lawmakers bestow lax regulation upon those with whom they sympathize and crack down on those with whom they do not. Generally, young, low-income women of color are over-represented in the detention facilities and punished most harshly in the juvenile justice system, including for prostitution.⁶⁴ These women do not enjoy the image of innocence that is socially inscribed upon young white girls, even where their crime is the same.⁶⁵ Because young women of color are judged against normative standards of femininity, in the eyes of authority and legal actors, their behavior is often interpreted as aggressive and defiant, not deferential.⁶⁶

The California State Legislature's position is that society needs protection from child prostitutes, despite the fact that they are most vulnerable to exploitation and punishment. Girls who are in more powerful positions, i.e., have a stable family life, a home, and people to advocate their interests in the Senate, are perceived as the ones in need of protection from

who commit acts of violence are seen as more deviant than boys who do the same because violence is expected of boys. *Id.*

⁶² In 1994, the number of girls arrested for all criminal offenses was an estimated 678,500. *See id.* Numerically more boys were arrested for prostitution than girls. *See id.* However, girls comprise of 49% of the arrests for prostitution even though they represent only 1/4 of total juvenile arrests. *See id.* Further, it is unclear what side of the power dynamic the boys arrested for this crime were on—whether they were selling themselves or pimping others. *See id.*

⁶³ *Id.*

⁶⁴ *Id.* at 20. African-American girls are also the fastest growing category of young people adjudicated for delinquent offenses, and "are treated more harshly than their European counterparts at all stages of the juvenile justice system." *Id.*

⁶⁵ Lamb, *supra* note 5, at 66. In the context of child prostitution, most child prostitutes in the US come from white middle class backgrounds. *See id.*

⁶⁶ CHESNEY-LIND, *supra* note 6, at 7.

the street girl who has none of these. Furthermore, the prostitution laws are drafted to protect the innocence of youth, as described in Senate hearings and statutory rape laws. Girls under the age of eighteen who have consensual sex are nonetheless seen as innocent and in need of protection. However, the same girl whose sexuality is commercially exploited is not given legal protection and is instead punished by the legal system. Does allowance of the use of one's body in exchange for money, food, or a place to stay mark consent? Or does it highlight the more exploitive nature of the transaction? The contradiction between statutory rape laws and criminal statutes against prostitution is irreconcilable on this issue.

b. Mandatory Sentencing

Recent legislation supported by the Committee on Moral Concerns passed in California, implements mandatory sentencing for solicitation within 1,000 feet of a private residence and doubles the punishment for subsequent convictions.⁶⁷ The effect of this legislation has been harsher punishment for the prostitute, but not her client. The reasoning behind the disparate treatment is that only the prostitutes are capable of solicitation, of offering of sexual acts in exchange for money.⁶⁸

c. The Meaning of Tougher Sanctions on HIV-Positive Prostitutes?

Not only do laws such as California Penal Code section 647(b) cast a broad net that captures child prostitutes, whom the law should protect as victims, the law actually protects those who seek the services of a prostitute. In 1988, California enacted strict laws against prostitutes who know that they are HIV positive, cracking down harder a decade later.⁶⁹ The classification for violating California Penal Code section 647(b), while knowingly carrying HIV raised from a misdemeanor to a felony charge in 1988 requiring a longer sentence to be served in prison.⁷⁰ The rationale is that people selling their infected bodies pose a deadly risk to the public.⁷¹ HIV, however, is a sexually transmitted disease, so that the persons immediately at risk ("The Public") are those who also violate the law to pay for sex. The crackdown does not punish buyers who knowingly or unknowingly have sex with an HIV positive prostitute, despite the fact that buyers transmit the HIV to a law-abiding public such as their partners and unborn offspring.

⁶⁷ *Cal. Comm. Analysis, July 9, 1996: Hearing on S. Comm. on Criminal Procedure B. No. AB 2949, 1996 Leg., 1995-96 Regular Sess. (Cal. 1996).*

⁶⁸ BLACK'S LAW DICTIONARY 582-83 (Pocket ed. 1996).

⁶⁹ *Cal. Comm. Analysis, April 21, 1998: Hearing on S. Comm. on Public Safety B. No. AB 1868, 1998 Leg., (Cal. 1998).*

⁷⁰ See generally WITKIN & EPSTEIN, *supra* note 41.

⁷¹ See Protection Abatement Comm. Analysis Cite source, *supra* note 8.

Discussions in the California State Legislature are driven by interests in the aggressive protection of children and families.⁷² Yet, if the HIV statute is intended to protect children, it will fail to do so by punishing the prostitute, especially if the prostitute is a child herself. The prostitute is not the one who transmits HIV to children and families. As a prostitute, she can only infect a client. It is a buyer that infects others—"the family man" who takes a serious risk by paying for sexual services from a potentially infected person. The prostitute may be responsible for infecting children and families only if an argument is made that the buyer has no control over his sexual acts with a prostitute because he was enticed to engage in it.⁷³ Though the law intends, on its face, to punish both prostitute and buyer, its logic deflects responsibility from the customer so that the prostitute carries full burden of increased punishment under the 1988 amendment.

Moreover, the HIV statute exemplifies not a measure to protect the public, but the punishment of the most disempowered persons. Those who are HIV positive are the most vulnerable people, particularly child prostitutes infected with HIV. They are not only in need of legitimate economic sustenance and social support programs but also medical treatment for a fatal condition.

4. Revisiting the Broken Window

Legislative discussions that rationalize crackdowns define the prostitute as a vector for the infiltration of crime, blight, and disease into decent neighborhoods. That is, neighborhoods that are not crime-ridden are empowered and funded enough to be able to fix their broken windows. Applying the Broken Window Theory to "decent" neighborhoods, however, is inappropriate. Only neighborhoods that cannot afford to fix a broken window must face any consequences that flow from it. Thus the Broken Window theory is only relevant in neighborhoods that are already disenfranchised.

⁷² *Id.*

⁷³ *Cal. Comm. Analysis, June 27, 1995: Hearing on S. Comm. on Criminal Procedure B. No. 1035, 1995 Leg., 1995-96 Regular Sess. (Cal. 1995).* At issue was a bill intended to deter drug and prostitution activity in neighborhoods by proscribing the intent to commit a crime in addition to the existing proscription against the crime itself. *See id.* The author of the bill argued that "to minimize the adverse effects these activities have upon local communities," law enforcement should focus on the body language of prostitutes to see whether it indicates an intent to commit prostitution. *Id.* Proposed indicia included "bodily gestures" that engages or attempts to engage those in motor vehicles in conversation. *Id.* Though the Legislature did not approve the indicia because it was too broad, the provisions of AB 1035 became effective the next year, which made it a misdemeanor to loiter in a public place with the intent of committing prostitution, as evidenced by "acting in a manner and under circumstances which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution." *Id.*

a. The Street Economy

There is little recourse for juveniles in the street economy.⁷⁴ They cannot return to abusive homes, find legitimate work, stable housing. The presence of prostitutes in any neighborhood does not represent “a broken window,” gateway to serious crime; rather, their presence is the manifestation of the neighborhood’s economy generated by the activities of the street and society’s inability to provide meaningful alternatives for those living and working there.

By founding the law on the Broken Window Theory, the Legislature points to street prostitution, which is present in disenfranchised, low-income communities. The blame is placed upon communities that cannot afford to “fix the window.” This suggests that it is not the existence of prostitution itself that is the problem for the legal community, but rather its visibility in certain areas and to persons it constructs as needing protection from its vice.⁷⁵ The Legislature enacted crackdown legislation while admitting, “there is no available empirical data to indicate whether mandatory incarceration for prostitution in residential areas would act to reduce the incidence of prostitution or act to increase the incidence of prostitution in non-residential areas.”⁷⁶ Street prostitution is the most visible form of prostitution, which makes for an easy target of children walking the street. Unfortunately, only the most destitute children work in the street economy. To target them is to target the most visible and sensational but the least representative of the criminals the law purports to arrest and prosecute for conducting prostitution.

b. Legal Response

Law enforcement does not hesitate to enact crackdown legislation that includes increasing penalties for multiple offenders. The “law and order” perspective is that multiple offenses represent greater willingness to break the law with more highly skilled and blatant defiance.⁷⁷ This rationale is

⁷⁴ See U. Penn. Press Release, *supra* note 9, at 2. “The largest of these groups [of children who are at risk of being sexually exploited] are runaway, throwaway and other homeless American children who use ‘survival sex’ to acquire food, shelter, clothing and other things to survive on America’s streets.” *Id.*

⁷⁵ *Cal. Comm. Analysis, June 27, 1995: Hearing on S. Comm. on Criminal Procedure B. No. 1035, 1995 Leg., 1995-96 Regular Sess. (Cal. 1995).* The author of this unsuccessful bill to deter drug and prostitution activity by punishing intent to commit violations argued that “commit prostitution” means to engage in sexual conduct engaged in as a pan of any stage performance, play, or other entertainment open to the public.” It is noteworthy that proponents of crackdown legislation probably do not want to argue against another dominant discourse, freedom of speech, where sexual content of entertainment is concerned.

⁷⁶ *Cal. Comm. Analysis, July 9, 1996: Hearing on S. Comm. on Criminal Procedure B. No. AB 2949, 1996 Leg., 1995-96 Regular Sess. (Cal. 1996).*

⁷⁷ *Cal. Comm. Analysis, May 9, 1995: Hearing on Assem. Comm. on Public Safety B. No. AB 567, 1995 Leg., (Cal. 1995).*

flawed because multiple offenses represent desperation and greater reliance on prostitution as a means of survival.⁷⁸ When a person is arrested multiple times, it is more likely that evidences that he or she is actually not skilled at eluding law enforcement. The effect of crackdown laws with increased sentencing is that those who are able to turn away from prostitution will be punished less severely than those who rely so heavily upon it that they risk harsher sanctions.

V. WHO SOLICITS OR ENGAGES?

A. *The Role of Buyers in Anti-Prostitution Legislation*

In 1986, California Penal Code section 647(b) was amended to provide that anyone who agrees to engage in an act of prostitution is guilty of a misdemeanor.⁷⁹ Before 1986, the burden of punishment lay solely on the prostitutes and did not address the criminal liability of the buyer. The delay in this statutory amendment highlights the biased origin of California Penal Code section 647(b)'s intent upon prosecuting the prostitutes themselves, rather than those who seek their services.⁸⁰

B. *The Role of Pimps and Procurers in Legislation*

As recently as 1998, the California law criminalized those who "direct, supervise, recruit, or otherwise aid another in the violation of PC § 647(b)."⁸¹ The statute also prohibited one to "collect or receive some or all of the proceeds earned from an act or acts of prostitution committed by another in violation of PC § 647(b)."⁸² Though pimps and procurers, as administrators, play an integral role in enabling acts of prostitution, the Legislature has only recently focused on that role. Similar to the role of buyer, the role of pimp and procurer is predominantly masculine, evidencing further that the history of laws against prostitution is one of punishing women for crimes that, in reality, in which both genders participate.⁸³

C. *The Juvenile Prostitute as Bad Decision-Maker*

California Penal Code section 647(b) makes an societal enemy out of all people who engage in prostitution on either side of the transaction. The

⁷⁸ See Protection Abatement Comm. Analysis Cite source, *supra* note 8.

⁷⁹ WITKIN & EPSTEIN, *supra* note 41, at 148

⁸⁰ This statutory provision was amended in 1995 to include suspension of certain driving privileges where the section 647(b) violation was committed within 1,000 feet of a private residence and with use of a vehicle. *Id.* at 148.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See generally Dworkin, *supra* note 54.

net it casts, however, captures children who run away from abusive homes and endure work in a street economy where prostitution appears a better option than their home life.⁸⁴ Most often, children do not run away because they are delinquents; rather they commit delinquent acts once they enter the street economy.⁸⁵ In such a context, children arrested for prostitution are both victims and perpetrators, creating a legal contradiction with ominous results.

1. The Discourse of Choice

The California Penal Code section 647(b) assumes that all people come from equal circumstances when prosecuting prostitution cases. Punishment may be imposed as long as the requisite intent is demonstrated. This punishment is only just if prostitutes come from similar socio-economic backgrounds as the people whom California Penal Code section 647(b) aims to protect.⁸⁶ However, the law should instead assume that a child's entry into prostitution is non-consensual and indicative that better means are unavailable or inaccessible to her. However, prostitution cases are not tried by weighing these factors. The law punishes these girls for making poor choices. In other words, a girl who makes a poor choice must be punished so that she and others will be deterred from making more or similar poor choices.⁸⁷ Legislation, law enforcement, and prosecution efforts fail to account for social factors that weigh heavily and mitigate choices that a child makes. This failure suggests that a child becomes a prostitute by a series of stupid mistakes or bad choices, even assuming she has choices due to personal weakness. Based on this misconception, the judiciary gives prostitution conspirators "an opportunity to reconsider and terminate their agreement and therefore avoid punishment."⁸⁸

2. The Socio-Legal Cycle

Child prostitutes are financially, socially, and politically disadvantaged in comparison to the adults who buy their services. Focusing on the social backgrounds of both the prostitutes and clients further clarifies that long before these transactions take place, there are two distinct but intertwined cycles at work: a social cycle and a legal cycle.⁸⁹ The social cycle is conceived

⁸⁴ See U. Penn. Press Release, *supra* note 9.

⁸⁵ See *id* at 2 (stating that "children from poorer families appear to be at somewhat higher risk of commercial sexual exploitation").

⁸⁶ See *id*.

⁸⁷ CAL. PEN. CODE § 647 Notes of Decision, *Solicitation; Prostitution* (Deering, LEXIS through 2003).

⁸⁸ *Id*.

⁸⁹ See generally *Broken Window/Mended Kids*, Office of Juvenile Justice and Delinquency Prevention, at <http://www.ojdp.ncjrs.org/about/press/oped9709.html> cite source (1997) (last

in the inequality of backgrounds between children who enter the street economy and people outside of it who pay for the illegal services that it caters.⁹⁰ Reliable sources from the legal community such as the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") report that children from "Broken Window" neighborhoods lack the same resources as their privileged counterparts.⁹¹ Choices and their viability vary according to one's background so that there is no equal footing from which to argue "choice," particularly where a child has been initiated into the illegal sex trade.

Prostitution is one means of survival in which many runaways engage in at one point in time or another.⁹² The more they participate, the more likely it is that they rely upon selling themselves for income.⁹³ Where prostitution is criminalized, a child prostitute's survival within the street economy is necessarily grounded in criminal acts. Juvenile prostitutes will most likely be arrested and incarcerated in the juvenile justice system as detainees who often serve time through adulthood, with strong indicators that their children will end up doing the same.⁹⁴

The juvenile justice system's purpose, unlike its adult counterpart, is rehabilitation rather than punishment. However, evidence of reform for individuals and preventing recidivism, especially for girls, is non-existent.⁹⁵ In fact, further physical and sexual abuse exists in facilities for juveniles where female detainees are concerned.⁹⁶ Most girls who enter the juvenile justice system are not afforded meaningful alternatives to the illegal sex work that they did to support themselves on the outside, so they return to the same street economy and continue prostitution upon release.⁹⁷ A socio-legal cycle emerges when the social and legal realities are examined together in the same way that they occur side-by-side in reality.⁹⁸

visited Feb. 24, 2003).

⁹⁰ See generally *Child Prostitution*, *supra* note 12.

The major problem for police when seeking victims to testify against the recruiter or pimp is that the police, for lack of public services, such as shelters, cannot offer anything in return for the testimony. For many children and youth, without a safe place to go, they cannot leave the pimp. To return home would be to return to the abuse which caused them to leave in the first place.

Id.

⁹¹ See, e.g., *Broken Window/Mended Kids*, *supra* note 90.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ CHESNEY-LIND, *supra* note 6, at 22.

⁹⁵ This is largely attributed to the fact that the juvenile justice system and programs are designed for males. See generally WEISS, *supra* note 11.

⁹⁶ LOIS WHITMAN & MICHAEL MCCLINTOCK, UNITED STATES: HIGH COUNTRY LOCKUP: CHILDREN IN CONFINEMENT IN COLORADO (Human Rights Watch 1997); *United States, Children in Confinement in Louisiana*, Human Rights Watch, available at <http://www.hrw.org/reports/1995/Us3.htm> (last visited Mar. 1, 2003).

⁹⁷ CHESNEY-LIND, *supra* note 6, at 89-93.

⁹⁸ *Id.*

VI. WHAT IS AN ACT OF PROSTITUTION?

A. The Descriptive Language of the Law

“Prostitution is defined as any lewd act between persons for money or other consideration.”⁹⁹ It is a specific intent crime, where the specific intent is to engage in prostitution.¹⁰⁰ California legislation aims to deter prostitution by enforcing mandatory sentences, increasing sentences for certain offenders, and fining offenders based on the number of times they violate the law.¹⁰¹ The law seeks to regulate the body of the girl who sells her sex. This is evident from the law itself, which assesses intent to commit prostitution in part from a girl’s body language, illustrated in debates that conceived anti-prostitution and crackdown laws.¹⁰²

B. Prostitution as Survival Strategy

An abusive home environment without recourse will prompt child to run away from it. Because the escape is illegal, the child will be deemed a criminal. The very act of running away is illegal so that any act of survival ensuing that is otherwise legitimate, such as finding work, is met with legal obstacles. When a child resorts to illegal work such as prostitution, she is punished severely because of the need perceived in society and legal entities to control female sexuality. If prostitution is recognized as both a survival strategy and an exploitive enterprise fraught with danger for the child whose body is subject to abuses, rape, and even murder, it is impossible to rationalize punishing her in place of buyers and pimps whom the law protects.

VII. CONCLUSION

Children and families, especially young girls, need a safe space that is free from harassment and danger, including their streets. However, the means by which the legal community can achieve and maintain a safe environment should not be through the removal of undesirable elements from the community, as California Penal Code section 647(b) and its progeny provide. The California Penal criminalize girls’ survival strategies in the name of public protection. A more grounded look, however, at whom the public consists of in legal discourse and the socio-legal cycle that informs what choice the law deems child prostitutes to have exposes crackdown legislation as ineffective and ultimately cruel. Where prostitution is

⁹⁹ § 647(b); *see also* *People v. Grow*, 148 Cal. Rptr. 648 (Cal. Ct. App. 1978).

¹⁰⁰ *People v. Norris*, 152 Cal. Rptr. 134 (Cal. Ct. App. 1978).

¹⁰¹ *See* Protection Abatement Comm. Analysis, *supra* note 8.

¹⁰² *See generally id.*

criminalized, pimps and buyers should be targeted for the commercial sexual exploitation of children who are incapable of consenting to sex when it is in exchange for money or other consideration needed for survival.