

(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors



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ABSTRACT

Over the last twenty years, domestic sexual trafficking of children has received increased attention from state and national policymakers and advocates. Indeed, states across the country have enacted laws establishing harsh new penalties for individuals convicted of domestic sexual trafficking. At the same time, arrest and conviction rates for Black girls within the juvenile justice system are increasing, often as a result of prostitution-related offenses. In this Article, I explore the race, gender, and class dynamics that animate these trends. In particular, I highlight the ways in which historic constructions of childhood, innocence, and sexuality shape antitrafficking law enforcement practices and how they have functioned in racialized and gendered ways to exclude Black girls from protection. Consequently, Black girls who are subject to sexual exploitation in the contemporary era are often labeled as offenders rather than victims. In sum, I contend that the intersectional identities of poor Black girls at once render them vulnerable to sexual exploitation and deny them access to protective antitrafficking regimes. To combat the discrimination that Black girls experience as a result of this exclusion, I propose decriminalization of girls who are subject to trafficking and robust investment in supportive race- and gender-conscious institutions that can prevent sexual exploitation.

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INTRODUCTION

*The powerful Western image of childhood innocence does not seem to benefit Black children. Black children are born guilty.*¹

Child prostitution has increasingly come to be understood as a pervasive social problem and a contradiction of terms. In Western tradition, the period of childhood is normatively constructed as a time of innocence and insulation for the responsibilities of adulthood; a time when children can psychologically and physically mature into fully functioning human beings, assessing their identities and roles within the broader society. During this formative period, social institutions function to protect children from adults who would seek to harm or misuse them. For many children, however, childhood is fraught with exploitation and sexual abuse. These children are often targeted by pimps, who exploit their bodies for commercial gain. Commonly decried as a modern form of slavery, children across the country are caught in this tragic cycle of sexual abuse and trauma. Far too often, however, sexually exploited children are not recognized as victims, despite their inability to consent to a sexual act, instead they are subject to prosecution for juvenile prostitution. To combat this problem, federal and local agencies have enacted statutes and initiatives that classify trafficked children as victims rather than offenders and increase criminal penalties for those guilty of encouraging or inducing the sexual trafficking of children.

In 2000, the U.S. Congress enacted the Trafficking Victims Protection Act (TVPA) “[t]o combat trafficking in persons, especially into the sex trade, slavery and involuntary servitude.”² According to the TVPA, “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked.”³ Adults are defined as severely trafficked persons—and therefore entitled to certain forms of protection such as access to T-Visas and other resources—if law enforcement finds that the “commercial sex act [was] induced by force, fraud or coercion.”⁴ By contrast, anyone under the age of eighteen who is the subject of trafficking is automatically defined as a “severely trafficked” person and is subject

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1. Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 877 (1994).
 2. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1464 (2000).
 3. 22 U.S.C. § 7101(b)(19) (2012).
 4. 22 U.S.C. § 7102(9)(A) (2012).

to the TVPA's protections for victims;⁵ unlike adult victims of trafficking, children need not establish that the trafficking occurred due to fraud or coercion in order to be classified as a "severely trafficked person." In other words, coercion is presumed when the victim is below the age of majority. Under the TVPA, individuals who are convicted of commercial sex trafficking of children are subject to punishment ranging from ten years to life in prison.⁶ Federal jurisdiction, however, is limited and most arrests for prostitution come under the purview of state and local law enforcement agencies. As a result, several states have enacted legislation to protect child victims of sexual exploitation and punish traffickers. For example, California voters recently approved the Californians Against Sexual Exploitation Act,⁷ which increased penalties for sexual traffickers and required those convicted of such crimes to register as sex offenders.⁸

The shift in federal and state policy regarding commercially sexually exploited children and the differential treatment of youth and adults accused of prostitution are normatively grounded in the concept of childhood, particularly the stage known as adolescence. Animating these policies is the view that children are categorically distinct from adults as a result of their innocence, vulnerability, and dependence.⁹ Because of these distinctions, children are deemed to lack the maturity and agency necessary to consent to a sexual act. Indeed, under the TVPA and similar state statutes, any sexual act involving a child is deemed inherently nonconsensual and coercive. Under this statutory regime, commercially sexually exploited children are entitled to protection, rather than punishment by the state. Yet appeals to protect children from punishment stemming from their sexual abuse have not attracted the support of a majority of states. Only fifteen states have passed robust Safe Harbor laws, which provide children who have been trafficked with immunity from prosecution and divert them out of the juvenile justice system.¹⁰ And across the country, children, particularly Black

5. 22 U.S.C. § 7102(8)(A) (2012).

6. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5067 (2008).

7. See, e.g., Anna Almendrala, *Prop. 35 Passes: California Voters Approves Harsher Sentencing for Human Traffickers*, HUFFINGTON POST (Nov. 7, 2012, 3:16 PM), http://www.huffingtonpost.com/2012/11/07/prop-35-passes-california_n_2089305.html.

8. See *infra* Part I.B.2.

9. See, e.g., Kevin Lapp, *Compulsory DNA Collection and a Juvenile's Best Interest*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 53, 77 (2014).

10. See, e.g., Stella Dawson, *U.S. Jails Sex-Trafficked Kids in Human Rights Abuse, Groups Say*, REUTERS (Mar. 16, 2015), <http://www.reuters.com/article/2015/03/17/us-trafficking-us-children-idUSKBN0MD0AJ20150317> (noting that only 15 states have safe harbors laws for sexually exploited children); *2014 State Ranking on Human Trafficking Laws*, POLARIS PROJECT, http://www.polarisproject.org/storage/2014SRM_pamphlet_download.pdf (last visited Jun. 28, 2015); *Sex Trafficking of Minors and "Safe Harbor"*, POLARIS PROJECT,

girls, are still arrested for prostitution, adjudicated as juvenile delinquents, and subject to confinement in juvenile detention centers.

I witnessed the disjuncture between emerging policy and the treatment of girls arrested for prostitution when I visited the Los Angeles County Central Juvenile Hall, where I was invited by the director to speak to a group of girls who were detained at the facility. The juvenile hall, located just two miles from the downtown Los Angeles campus where I teach, felt worlds away. In the midst of an industrial area, concrete walls surrounded the facility, its exterior yellowing with age. As I entered the detention center, I underwent a security screening and was escorted to a locked unit by the director. In the recreation hall where I was to speak, I encountered a group of approximately sixteen girls, neatly dressed in tan uniforms and sitting mostly in silence as probation officers stood by. The girls were between the ages of fourteen and eighteen. Roughly 70 percent were Black and the other 30 percent were Latina. None were white. As we spoke, nearly all of them described experiencing some form of homelessness, abuse, or both. Many of the girls had been arrested for prostitution or prostitution-related offenses such as running away or curfew violations. Some had sold sex for survival while others had been recruited by pimps and trafficked on the street or online. Some had engaged in other activities, such as gun or drug possession at the behest of pimps. Nearly all of them were confirmed or suspected by law enforcement of being commercially sexually exploited children. Yet the girls were likely to spend weeks or months in the facility as they awaited proceedings in delinquency court or while their placements were determined.

The treatment of the girls is emblematic of the ways in which race, gender, and other identities shape responses to sexually trafficked children. In many respects, the Black girls I encountered at the juvenile detention facility did not enjoy the presumptions of childhood that undergird antitrafficking initiatives; they have been denied the protections of childhood. Rather, the protections of childhood afforded to the Black girls in the juvenile detention center, like the concept itself, are dynamic and highly contingent on other identity categories such as race, gender, and class. As such, when applied to them the concept of childhood is often partial, or incomplete, especially within the juvenile justice system. While some children are extended significant protections and diverted out of the juvenile justice system, others are directed into a system designed to discipline delinquent youth.

Indeed, like many other areas in the criminal justice system, the enforcement of policies regarding sexually exploited children is uneven and rife with racial disparities.¹¹ Often the protective state and federal policies regarding child sex trafficking are invoked only after a child is deemed by a member of law enforcement to be a likely victim of sexual trafficking. Such discretionary designation enables racial bias—implicit or explicit—to shape who is viewed as a perpetrator and who is viewed as a victim. Studies have found that Black girls constitute a disproportionate number of juvenile arrests for prostitution, that they are more likely than their white counterparts to be adjudicated through the juvenile system, and that they are more likely to be detained in a locked facility even if identified as a victim of sexual trafficking.¹² In sum, Black girls are often not viewed as children for purposes of protection under state and federal law.

The treatment of the girls at the juvenile detention center reflects the ways in which predominately poor, Black girls exist at a structural location that renders them vulnerable to sexual abuse on the one hand and criminalization for prostitution on the other. The poverty, joblessness, and inadequate housing that characterized their predominately Black and Latino neighborhoods undermined the stability of their families and communities. With families in distress and little in the way of community resources to provide assistance, girls were often placed in the juvenile dependency system or—worse—left to find their way on the street. In the foster care system, they were often vulnerable to sexual abuse and trauma in their foster homes, and were targeted by pimps outside the home. Living in heavily policed jurisdictions, they were highly visible to law enforcement and therefore more likely to be arrested for a prostitution-related offense. Indeed, in one Los Angeles County study of juveniles arrested for prostitution, it was found that Black girls comprised 92 percent of arrestees even though they are but 3 percent of the population.¹³ This pattern is not unique to Los Angeles or its juvenile detention centers; rather, it is reflected in

11. See Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 925 (2006); Mike Kessler, *Gone Girls: Human Trafficking on the Home Front*, L.A. MAG., (Oct. 14, 2014), <http://www.lamag.com/longform/gone-lo-girls/#sthash.uGInKLyf.dpuf> (noting that 90 percent of girls appearing before the court adjudicating victims of sexual exploitation are Black).

12. See *infra* Part I.A.

13. Albert Sabate, *Los Angeles Task Force Takes on Underage Prostitution*, ABC NEWS (Dec. 12, 2012), http://abcnews.go.com/ABC_Univision/News/los-angeles-task-force-takes-underage-prostitution/story?id=17844111 (“African American girls made up 92 percent of the underage arrestees—some who were as young as 10 years old.”).

communities and urban centers across the United States.¹⁴ And while the race and class identities of the girls heightened their visibility for purposes of prosecution, those same identities rendered them invisible for purposes of protection. Childhood, which serves as the normative grounding for anti-child sex trafficking initiatives is viewed as a natural, essential category of human development that includes all persons below the age of majority. An emerging body of literature, however, has contested this understanding of childhood, arguing that the category is socially constructed.¹⁵ Like other social categories, childhood is shaped by other identity categories such as race and gender. Indeed, ideological constructs of children of color—particularly Black children—as less innocent and more adult are well documented.¹⁶ As a result of these constructs and their attendant stereotypes, Black children often experience significant discrimination and mistreatment. For example, they are suspended from school for minor misbehavior at rates higher than their white counterparts,¹⁷ are more likely to come into contact with the criminal justice system,¹⁸ are more likely to be criminally prosecuted,¹⁹ and when prosecuted are more likely to be charged as adults.²⁰

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14. See, e.g., Albert Sabate, *Los Angeles Task Force Takes On Underage Prostitution*, ABC NEWS (Dec. 7, 2012), http://abcnews.go.com/ABC_Univision/News/los-angeles-task-force-takes-underage-prostitution/story?id=17844111; see also Part II, *infra*.
 15. See, e.g., HENRY A. GIROUX, *YOUTH IN A SUSPECT SOCIETY: DEMOCRACY OR DISPOSABILITY* 18–19 (2009); Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J. L. & GENDER 715, 736–38 (2013); Diana Gittins, *The Historical Construction of Childhood*, in AN INTRODUCTION TO CHILDHOOD STUDIES 35 (Mary Jane Kehily ed., 2009); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 527 (2014); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 818 (2003); M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 380 (2010); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1109 (2012).
 16. See generally Goff et al., *supra* note 15 (arguing that Black children are perceived to be more mature at earlier ages than their white counterparts); see also ALLISON JAMES & ADRIAN JAMES, *CONSTRUCTING CHILDHOOD: THEORY, POLICY AND SOCIAL PRACTICE* 10–13 (2004).
 17. See, e.g., KIMBERLÉ WILLIAMS CRENSHAW ET AL., *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED* 16 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d23be0e4b0bb6a8002fb97/1423064032396/BlackGirlsMatter_Report.pdf.
 18. Marian Wright Edelman, *Disproportionate Minority Youth Contact: Keynote Address*, 15 J.L. & POL'Y 919, 927 (2007).
 19. Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 104 (2015) (noting that “African American girls the fastest-growing segment of the juvenile justice system”); NAT'L COUNCIL ON CRIME & DELINQUENCY, *AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM* 3 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf.
 20. Tera Ageypong, *Children Left Behind Bars: Sullivan, Graham, and Juvenile Life Without Parole Sentences*, 9 NW. J. INT'L HUM. RTS. 83, 98 (2010) (“African American children, who make up 60% of all children sentenced to life without parole, are sentenced to LWOP at a rate that is ten times higher than that of white youth.”).

The stereotypes that deny Black children their childhood are both racialized and gendered. Because Black boys are viewed as more mature, they are treated more harshly by the systems with which they interact.²¹ Black boys are more likely to be tried as adults and are disproportionately represented among juveniles who have been sentenced to life imprisonment.²² In the context of the commercial sexual exploitation of children, gendered and racialized biases against Black girls cast them as more mature and thus as possessing more agency over their sexuality than their white counterparts.²³ They are viewed as “street smart,” less dependent on adults, and less vulnerable to adult manipulation or abuse. When detected by law enforcement, their failure to cooperate may be interpreted as consent to and complicity in prostitution. As a result, they are often confined or punished rather than provided with adequate support services. Moreover, this exclusion from the category of childhood is compounded by scholarship and policy initiatives that have failed to thoroughly interrogate the intersection of race, gender, and childhood. In much of the scholarship regarding commercially sexually exploited children, for example, scholars have argued that trafficked children should be treated as victims rather than offenders, that specific programming should be created to address the children’s trauma, and that penalties for child traffickers should be increased.²⁴ Yet, the racial and gender biases that affect presumptions of childhood are underexamined in the broader scholarly and policy conversations regarding trafficking and therefore limit the effectiveness of such initiatives.²⁵

In this Article, I interrogate this discursive gap. I examine the intersectional dynamics that lead to the simultaneous overpolicing and underprotection of sexually exploited girls of color, particularly Black girls. I argue that Black girls occupy a space I term liminal childhood. Specifically, I argue that racialized and gendered constructions of childhood innocence, maturity, and sexual agency exclude Black girls from the protection of anti-child trafficking statutes and initia-

21. See, e.g., Goff et al., *supra* note 15, at 527.

22. See, e.g., Agyepong, *supra* note 20, at 98.

23. See Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 24 (2004).

24. See, e.g., Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 3–4 (2011).

25. One notable exception includes Emily Chaloner, *Anybody’s Daughter? How Racial Stereotypes Prevent Domestic Child Prostitutes of Color From Being Perceived as Victims*, 30 CHILD. LEGAL RTS. J. 48, 50–51 (2010). Additionally, within this issue of the UCLA Law Review, legal scholar Cheryl N. Butler has noted the ways in which race and gender shape the experience of commercially sexually trafficked minors. See Cheryl N. Butler, *The Racial Roots of Human Trafficking* 62 UCLA L. REV. (forthcoming 2015). See also Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002).

tives. In describing this concept, I assert that Black girls exist at the margins of childhood, burdened with aspects of childhood that prevent their full participation in society—such as not being able to vote—while simultaneously being excluded from the protective constructions of childhood—such as the inability to consent to certain kinds of sexual acts or diminished culpability in the criminal setting. Stated differently, as liminal children, they are at once viewed as dependent, limited rights-bearing subjects while at the same time imbued with adult characteristics such as sexual maturity, individual agency and criminal responsibility. Thus, they are directed into rather than out of the juvenile justice system.

In advancing this argument, I note that exclusion from notions of childhood and innocence are part of a historical genealogy of sexual exploitation of Black women and girls. Stereotypes of their sexual maturity and promiscuity were used to justify the exploitation of the reproductive capacities of Black women and girls as a means of maintaining the system of chattel slavery. In the post-Reconstruction era, prostitution offenses were used as a basis to control Black female sexuality and to reassert control over their labor under the auspices of the criminal justice system. Indeed, criminalization played a significant role in reinforcing stereotypes of sexual agency and deviance among Black women and girls. In the Jim Crow era, sexuality was cited as a basis to excuse the routine rape and abuse of Black females. In the contemporary era, the image of the lascivious and fecund Black teenager was used to promote draconian social welfare reform. These images persist in denying Black girls their childhood and innocence within a juvenile justice system grappling with how to handle sexually trafficked minors. In sum, I will interrogate the ways in which racism and patriarchy dehumanize Black girls, rendering them vulnerable to sexual exploitation on the one hand, while prosecuting them for prostitution on the other.

The impact of racialized and gendered constructions of childhood and innocence are not merely theoretical or academic. The social marginalization experienced by Black girls as a result of poverty, homelessness and educational inequity places them at a higher risk of victimization. The characteristics associated with their liminal status as children, including stereotypes of sexual agency, maturity and culpability, makes it more likely that they will be suspected by law enforcement and adjudicated as delinquents rather than protected as victims. To the extent that states are moving toward a law enforcement approach to combating the sexual trafficking of children, such initiatives, and the discretion given to the police agencies that execute them, may cause Black girls to be punished more harshly than similarly situated white girls. Moreover, the investment of resources into law enforcement and imprisonment often results in a divestment

from social institutions and structural reforms that address the root causes of vulnerability to exploitation, such as economic marginality, housing instability, and various forms of trauma. The failure of antitrafficking initiatives to attend to race, gender, and the structural causes of vulnerability of Black girls to exploitation runs the significant risk of further marginalizing those who are most in need of protection.

In closing, I call for an analysis of the dynamics that contribute to the commercial sexual exploitation of children through an intersectional lens that is attentive to race, gender, class, and sexual orientation. Such an approach would require mandatory decriminalization of youth who are trafficked, which would eliminate the biased use of discretion and ensure that Black girls are not consigned to a life at the margins as a result of their ongoing contact with the criminal justice system. Such an analysis should inform policymaking and focus attention the structural vulnerabilities—such as limited housing, education, and health care—that lead to domestic child sex trafficking, particularly of poor Black girls. The use of an intersectional lens would enable the establishment of protective institutions and practices that address the liminality experienced by Black girls through race-conscious and gender responsive programs in schools and other social service agencies, including the foster care system where Black girls are most vulnerable to being trafficked. This analysis would see sexual exploitation as part of a larger ecosystem of inequality that disproportionately affects Black girls.

This Article proceeds in four Parts. In Part I, I describe the concept of liminal childhood and note the ways in which girls of color, particularly Black girls, have been underserved and underprotected by social constructions of childhood, innocence, sexual agency, and diminished criminal responsibility that undergird the contemporary approaches to the commercial sexual exploitation of children. In particular, I discuss the historical and racial genealogy of normative constructs of childhood, innocence, and agency. In Part II, I briefly survey the historical and contemporary responses to child sex trafficking at the federal and state levels and note the ways in which the liminal status of Black girls has shaped antitrafficking initiatives over time. In Part III, I argue that the liminal childhood experienced by Black girls helps to explain the exclusion of Black children from protective anti-child trafficking initiatives. In Part IV, I offer some preliminary thoughts on moving toward a more racially inclusive, structural approach to anti-child sexual trafficking and highlight how sexually exploited Black girls are failed at various stages of the juvenile justice system.

I. LIMINAL CHILDHOOD: EXCLUSION OF BLACK GIRLS FROM SOCIAL CONSTRUCTIONS OF CHILDHOOD AND INNOCENCE

Childhood is commonly understood as a biological and developmental phase in which individuals lack maturity and are therefore in need of protection. This consensus view is reflected in law and policy both locally and globally. According to the United Nations Convention on the Rights of Children,²⁶ a child is defined as any individual below eighteen years of age.²⁷ The Convention goes on to state that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”²⁸ Such protections include “the right to protection against all forms of neglect, cruelty and exploitation.”²⁹ The Declaration captures the ways in which law and culture function to construct and codify childhood and to give the developmental phases associated with childhood meaning. Moreover, the Convention on the Rights of the Child is a useful starting point for the discussion of childhood and anti-child sex trafficking policies given that it has served as a basis for international antitrafficking legislation and articulates the conceptions of childhood—including immaturity, innocence, and protection—that justify such legal interventions.

Indeed, in a 2010 Department of Justice Report on the subject of child sexual exploitation, protecting childhood was cited as the normative justification for federal antitrafficking efforts. In particular, the report stated that “[t]he sexual abuse and exploitation of children rob the victims of their childhood, irrevocably interfering with their emotional and psychological development. Ensuring that all children come of age without being disturbed by sexual trauma or exploitation is more than a criminal justice issue, it is a societal issue.”³⁰ This statement reflects the ways in which the heightened protections for children who are sexually exploited are often justified by conceptions of children’s innocence and the heightened vulnerabilities associated with childhood.³¹ The statement also exemplifies how the characteristics of childhood, such as innocence, are assumed to be naturally or biologically occurring.

26. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. I-27531.

27. *Id.* at 46.

28. *Id.* at 45.

29. *Id.* at 56.

30. U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 1 (2010) *available at* <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

31. Pantea Javidan, *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multi-dimensional Understanding*, 1 COLUM. J. RACE & L. 365, 380 (2012).

Despite the universal language used in these statements to describe childhood and the protections available to children who are sexually exploited, Black girls have fallen between the cracks and are disproportionately subject to arrest and detention for prostitution-related offenses. Estimates vary, but studies suggest that approximately 100,000 children are sexually trafficked each year and the Federal Bureau of Investigation reports that approximately three hundred thousand children are at risk of being sexually trafficked each year.³² Although children of all racial backgrounds and gender identities may be subject to sexual exploitation, Black girls are far more likely than their white or Latina counterparts to be identified as victims of trafficking.³³ In a 2011 report by the Department of Justice, approximately twenty-five hundred confirmed victims of trafficking were detected in the United States.³⁴ The report found that African Americans constituted 40 percent of the suspected victims and 62 percent of the confirmed perpetrators of sexual trafficking.³⁵ In Los Angeles and New York, two cities that the FBI identified as hot spots³⁶ for child sex trafficking, the numbers are even more stark. In 2010, the Los Angeles County Probation Department identified 174 sexually trafficked children, 92 percent of whom were African American.³⁷ A study of juveniles arrested for prostitution offenses in New York City found that “seventy percent were African American, although only twenty percent of all New York City residents were African American according to the 2000 census.”³⁸

Earlier I noted that the Black girls who experience sexual exploitation or arrest for prostitution offenses, such as the girls I encountered at the juvenile deten-

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32. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI LAW ENFORCEMENT BULLETIN (Mar. 2011), available at <http://leb.fbi.gov/2011/march/human-sex-trafficking>. See, e.g., RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 92 (2001), <http://www.hawaii.edu/hivandaids/Commercial%20Sexual%20Exploitation%20of%20Children%20in%20the%20US,%20Canada%20and%20Mexico.pdf> (estimating that thirteen is the average age of young women when they become victims of trafficking).
 33. DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, *CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010*, at 6 (2011), <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>. Studies, however, are unclear whether the disproportionate arrests and prosecution of Black girls for prostitution is as a result of increased exploitation or as a result of increased attention directed toward Black girls by law enforcement.
 34. *Id.*
 35. *Id.*
 36. *The Federal Bureau of Investigation's Efforts to Combat Crimes Against Children* ch.4 n.122, OFFICE OF INSPECTOR GEN. (2009), <http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm#122>.
 37. *What Is Human Trafficking?*, SAVING INNOCENCE, <http://www.savinginnocence.org/about/the-problem> (last visited Mar. 6, 2015).
 38. Javidan, *supra* note 31, at 379.

tion center, are deprived of the opportunity to be children. This statement, however, belies the complicated nature of childhood. Indeed, childhood is not only a matter of chronological age: It is a socially constructed category that intersects with and depends upon prevailing conceptions of race and gender. Thus, if one wants to understand why Black girls are at once the disproportionate victims of sexual trafficking and prosecuted as offenders, one must first examine the normative constructs of childhood that animate anti-child sexual trafficking statutes and consider the ways in which such constructs have been racialized and gendered in a manner that excludes Black girls, constituting a unique form of discrimination.

Black girls, who exist at the intersection of this racialized and gendered construct, experience what I call liminal childhood. Here, I draw upon the term liminality as it “corresponds roughly to the terms ‘marginal’ and ‘peripheral,’ designating an individual or (and more often) a group, whose inclusion in the community is ambiguous.”³⁹ Persons who occupy a liminal identity are, as anthropologist Victor Turner has noted, “neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremon[y].”⁴⁰ Scholars who study immigration have drawn upon the concept of liminality to interrogate the relationship between various forms of legal status and belonging.⁴¹ In the context of childhood, the concept of liminality usefully highlights the porous boundaries of the legal and ideological category.

As a social construct, childhood is not a category that exists outside of intersections with other identities such as race, gender, or class.⁴² Rather, these other identities actively shape childhood and perceptions of it. From a very early age, even before adolescence, Black girls exist at the border of childhood and adult-

39. ANNE NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 12 (1986). The concept of liminality has also been deployed by post-colonial and border theorists. See, e.g., Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 989 (2002) (“It is the experience of being ‘neither here nor there’—or, stated more affirmatively, being located in a ‘third space’ beyond the parameters of any individual nation-state—that shapes the sense of postnational identity to which many commentators refer. Scholars have developed concepts that seek to capture this experience—including hybrid identity, transnational identity, deterritorialized identity, and liminality—to express this phenomenon.”); Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153, 156 (2008) (“In the process, these migrating marriages and their turn to conflicts place same-sex marriage in a kind of state of liminality, betwixt and between recognition and nonrecognition.”).

40. VICTOR TURNER, *THE RITUAL PROCESS* 95 (1969).

41. See, e.g., Cecilia Menjivar, *Liminal Legality: Salvadorian and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1007 (2006).

42. See ROBIN BERNSTEIN, *RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS* 6 (2011).

hood, viewed as dependent for some purposes and independent for others. Black girls are included in the construct of childhood to the extent that they are deemed to be dependent and thus denied the right to full membership in the polity. They cannot, for example, vote, drink, execute contracts, serve in the military, or exercise other rights associated with adulthood. In many states, they cannot control their reproductive capacities by accessing abortion without parental approval. Yet, while Black girls are assigned a dependent status, they often do not benefit from the corresponding protections associated with childhood and dependency, as Black girls are more likely than their white counterparts to be pushed out of school,⁴³ represented in an increasingly punitive and inadequate foster care system,⁴⁴ regulated by the juvenile justice system,⁴⁵ and more likely to be prosecuted or detained for prostitution-related offenses than their white counterparts.⁴⁶ The liminality experienced by Black girls, the simultaneous inclusion and exclusion of Black girls from childhood, is facilitated by adult-like stereotypes that are assigned to them. These stereotypical characteristics include sexual maturity, possession of agency to make important life decisions and the ability to be criminally responsible for their conduct.

The liminal childhood experienced by Black girls also reflects the ways in which they have been subject to a process of dehumanization and othering.⁴⁷ As Patricia Hill Collins notes, Black women (and girls) have historically served “[a]s the ‘Others’ of society who can never really belong, strangers [who] threaten the moral and social order. But they are simultaneously essential for its survival because those individuals who stand at the margins of society clarify its boundaries.”⁴⁸ Indeed, Black girls exist at the border of childhood, simultaneously included for some purposes and excluded for others. Their liminal status functions to define the conceptual boundaries of childhood and innocence, for

43. See MONIQUE W. MORRIS, AFRICAN AM. POLICY F., RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 6 (2014), <http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5422efe3e4b040cd1f255c1a/1411575779338/Morris-Race-Gender-and-the-School-to-Prison-Pipeline+FINAL.pdf>.

44. See Shani King, *The Family Law Canon in A (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 602 (2011).

45. See generally Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (describing the racially disparate representation of Black girls within the juvenile justice system).

46. See *supra* Part I.A.2.

47. See Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 707 (1989) (noting that “race presents the most serious otherness problem”).

48. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 70 (2000).

they stand as a contrast to good or deserving children that are appropriately afforded the protections of the state.

A. Race, Gender, and the Normative Constructions of Childhood

Ranging from infancy to adolescence, childhood is often described as a biological and chronological stage through which human development is measured. Under this understanding of childhood, all persons below the age of majority are included, without regard to race, class, gender, disability, or other identity markers. As such, childhood is a powerful normative grounding for legal frameworks and social institutions such as familial responsibilities owed from parent to child and the state's duty to establish child-serving institutions such as schools. Although there is certainly a biological component to childhood, a strict biological account functions to mask the social and legal processes that construct childhood as well as the racialized and gendered dynamics that exclude Black girls. Rather, histories of racial and gender subordination, including slavery and Jim Crow, have interacted with the category of childhood to create a liminal category of childhood that renders Black girls vulnerable to sexual exploitation and criminalization.

1. Traditional Biological–Developmental Theory of Childhood

Under the traditional biological view of childhood, the differential treatment of children as compared to adults is rooted in physical and cognitive developmental processes, which are viewed as concluding at the age of majority. This traditional view presumes the natural and universal existence of childhood, with certain essential characteristics. As Phil Goff has observed, “[i]ndividuals tend to understand ‘children’ as an essential category . . . the principal characteristics of which are age . . . and innocence.”⁴⁹ The essential innocence of childhood makes children more susceptible to manipulation and abuse by adults. As a result, systems designed to protect children derive their reason for existing from such essentialized notions of innocence.

In addition to innocence, immaturity is also included as an essential, biological characteristic of childhood, particularly at the stage of adolescence. For example, studies have indicated that the parts of the brain associated with critical thinking, “long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence,

49. Goff et al., *supra* note 15, at 527.

and perhaps well into young adulthood.⁵⁰ Consequently, law and social custom treat adolescence as a bridge between the two developmental periods of childhood and adulthood; adolescents are given increased autonomy but remain limited rightsholders, subject to pervasive regulation by their families and by the state.⁵¹ For these reasons, as legal scholar Jonathan Todres has noted, “[m]aturity is a foundational concept in all law related to children.”⁵²

Indeed, the diminished capacity of adolescent children to evaluate risk⁵³ has been recognized by a range of legal institutions and used as a justification for the creation of specific rules that apply to juveniles in the context of the criminal justice system. For example, in *Roper v. Simmons*,⁵⁴ the U.S. Supreme Court considered the constitutionality of the application of the death penalty to juveniles. In ruling that the use of capital punishment on an individual for an offense committed as a juvenile violated the Eighth Amendment’s ban on cruel and unusual punishment, the Court observed that “adolescents are overrepresented statistically in virtually every category of reckless behavior”⁵⁵ because of “[a] lack of maturity and an underdeveloped sense of responsibility.”⁵⁶ According to the Court, such recklessness and lack of foresight are among “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult” and “also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”⁵⁷

Adolescence is also marked by a profound period of identity formation and exploration of individuality. Researchers have found that “[i]ndividuals do not develop a coherent sense of identity until young adulthood, and adolescence is characterized by exploration, experimentation, and fluctuations in self-image.”⁵⁸ During this period of identity development, adolescents are more likely to be impacted by peer pressure and judgment, which may render them vulnerable to ex-

50. Scott & Steinberg, *supra* note 15, at 816. See generally JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT (1993) (analyzing various stages in cognitive development associated with childhood).

51. See Goff et al., *supra* note 15, at 528; L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 417 (2000).

52. Todres, *supra* note 15, at 1109.

53. See Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. ON CRIM. L. 107, 116 (2013) (“Although mid-adolescents’ cognitive abilities are comparable with adults, their judgment and impulse control does not emerge for several more years. Youths’ immature judgment reflects differences in risk perception, appreciation of future consequences, and experience with autonomy.”) (internal citations omitted).

54. 543 U.S. 551 (2005).

55. *Id.* at 569.

56. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

57. *Id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1998)).

58. Scott & Steinberg, *supra* note 15, at 812.

exploitation or criminalization.⁵⁹ As the Court noted in *Eddings v. Oklahoma*,⁶⁰ another case involving a challenge to the imposition of the death penalty on a person who was a juvenile at the time of the offense, “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”⁶¹

In the account described above and embraced by legal institutions, including the Supreme Court, childhood is regulated by naturally occurring developmental processes. In the criminal justice system, such developmental processes render children less responsible for their behavior. This view of childhood certainly makes intuitive sense to those who have spent time around young children or adolescents. This account, however, is incomplete. While the various stages in human development are biological, the meaning and legal effect attached to those stages are socially constructed. Indeed, although the traditional developmental approach has been the dominant framework for understanding the boundaries of childhood, this account masks the social relations embedded within the concept of childhood. As Annette Appell notes, “[t]here is some universality in the vulnerability and dependency of young children, but the length, contours, and extent of that dependency, as well as the assignment of children to dependency, vary greatly across time, nation, and geography.”⁶² Moreover, the extent of childhood dependency and vulnerability is shaped by other socially constructed identity categories such as race, gender and class.

2. The Social Construction of Childhood

Over the last three decades, a robust literature describing childhood as a social construct has emerged in law, sociology, and psychology.⁶³ In this literature, childhood is described as part of a binary construct of human development in which childhood is contrasted with adulthood. Childhood is viewed as a chronologically based, transitory identity that projects social meanings of innocence, immaturity, and vulnerability onto various stages of intellectual, emotional, and physical development. At some point, generally established by law, children age

59. *See id.* at 814–15.

60. 455 U.S. 104 (1982).

61. *Id.* at 115.

62. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 704 (2009).

63. *See* sources cited *supra* note 15.

into adulthood and become full and independent members of the polity.⁶⁴ The point at which childhood ends and adulthood begins, is not, however, biologically determined. Rather, this boundary is determined “in relation to our social, political, historical and moral context.”⁶⁵ In sum, the social constructivist view of childhood posits that the boundaries of childhood are unstable and contingent, shifting over time depending on the historical and institutional setting.

Critical theories of childhood often compare the social construction of the category of “woman” to the category of “child.” This comparison is useful for a number of reasons. Both are theorized as socially constructed identities. Both have been imbued with similar kinds of characteristics at various historical moments. Certainly, as Appell notes, the “inevitably (i.e., naturally) private, vulnerable, and dependent child is reminiscent of the naturally private, vulnerable woman of the pre-feminist past.”⁶⁶ These characteristics have been used to justify regulation and subordination of both women and children. The comparison is also useful inasmuch as it demonstrates the ways in which Black female bodies have been excluded from both categories, constructed as antithetical to notions of femininity, vulnerability, innocence and dependency.

Black feminist theorists have long argued that Black women have been constructed as existing outside of the category of woman or female, which has been racialized as white and grounded in the normative experiences of white women.⁶⁷ In what Paula Giddings has called the “Cult of True Womanhood,” womanhood is culturally and legally grounded in sexual purity and domesticity, particularly the realm of motherhood. Within the social constructs created during the era of chattel slavery, Black women were placed in opposition to these prevailing notions of womanhood. Black women, who were forced to labor in the fields and who possessed little control over their own bodies, including their sexuality, were denied access to the identity of woman that was predicated on domestic work and sexual purity. Instead, Black women’s identities served to “clarify [the] boundaries”⁶⁸ of womanhood through construction of what Hortense Spillers

64. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 558–62 (2000) (discussing the logic of legal presumptions of majority and noting that the legal age of majority was twenty-one in the early history of English common law).

65. ALLISON JAMES, CHRIS JENKS & ALAN PROUT, *THEORIZING CHILDHOOD* 27 (1998).

66. Appell, *supra* note 62, at 715.

67. Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540, 550–58; Phillip Atiba Goff et al., “Ain’t I a Woman?” *Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 SEX ROLES 392, 394 (2008).

68. See COLLINS, *supra* note 48, at 70.

calls an “ungendered” subject.⁶⁹ Similarly, these dynamics function to exclude Black girls not only from the category of woman or female, but also from the category of child. Like the category of woman, white children serve as the paradigmatic subject of childhood while Black children occupy a marginal or liminal status within the racialized construct of childhood. As a result, Black children are denied the “developmental reality” of childhood that undergirds protective policy and institutions.

a. Shifting Definitions of Childhood

Childhood is a fluid concept, subject to change over time and geographic space.⁷⁰ For example, in Western European societies, childhood has ranged from a category that was largely indistinguishable from adulthood to one that has acquired particular recognition and protection; from an identity associated with evil to one associated with innocence.⁷¹ Childhood theorists have articulated the historically contingent nature of childhood beginning in the middle ages, noting that “in medieval society childhood did not exist” because children “participated in society according to their abilities just as adults did.”⁷² Later, under the pre-Enlightenment doctrine of infant depravity, children were recognized as a distinct category and were viewed as inherently sinful, lacking in the ability to control the basest human impulses.⁷³ Adults were viewed as more evolved, with a heightened capacity of self control.⁷⁴ Parents were encouraged to harshly discipline their children in order to reign in their excesses.⁷⁵ Not only were children harshly disciplined, but they engaged in labor outside of the home. During this period, children, particularly adolescents, “were viewed as the property of their parents and were mainly valued as a source of cheap labor.”⁷⁶ For example, children “worked at home, were bound out as servants and apprentices, or were slaves, and they fought in military combat.”⁷⁷

69. See Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65, 68 (1987).

70. See JAMES & JAMES, *supra* note 16, at 13 (“Childhood must be seen as a particular cultural phrasing of the early part of the life course, historically and politically contingent and subject to change.”).

71. *Id.*

72. *Id.* at 12; PHILLIPE ARIES, *CENTURIES OF CHILDHOOD: A HISTORY OF FAMILY LIFE* 125 (1962).

73. See BERNSTEIN, *supra* note 42, at 4, 36–37.

74. See *id.* at 4.

75. See *id.* at 36–37.

76. Nunn, *supra* note 25, at 679.

77. Appell, *supra* note 15, at 737–51 (footnote omitted).

In the early nineteenth century, however, the view of childhood began to shift from inherent sinfulness to inherent innocence.⁷⁸ Children were viewed as innocent and in need of protection from a dangerous adult world.⁷⁹ As Henry Giroux notes, “[w]ithin the myth of innocence, children are often portrayed as inhabiting a world that is untainted, magical, and utterly protected from the harshness of adult life.”⁸⁰ During this era, children were viewed as lacking in adult qualities such as maturity, sexuality, and the capacity for independence, all while being wholly unconcerned with worldly affairs.⁸¹ Children came to be seen “as dependents in social, political, legal, and economic matters.”⁸² Over time, the notion that children were innocent and incomplete became socially entrenched, triggering state regulation to both deny children autonomy and to invest in them a particularized set of protections designed to facilitate their transition into the complete state of adulthood.⁸³

The construct of the innocent and incomplete child prompted concerns about the protection of children from the ugliness of the adult world through the creation of policies and institutions designed to provide services to and prohibit the exploitation of children. As Owain Jones notes, “the notion of ‘protected childhood’ animated concerns of American reformers as early as the 1820s.”⁸⁴ Reformers advocated for programs like Sunday school, free schools and other child-centered social services.⁸⁵ States began to enact child labor laws and to implement juvenile curfews to ensure the safety and security of children in their communities. In various fields, such as medicine, specialized areas of practice

78. *See id.*

79. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1093 (1991).

80. HENRY GIROUX, STEALING INNOCENCE: YOUTH, CORPORATE POWER AND THE POLITICS OF CULTURE 39 (2000).

81. *See* SARAH HOLLOWAY & GILL VALENTINE, CHILDREN’S GEOGRAPHIES: LIVING, LEARNING, PLAYING 2 (2000) (“Children in the West are assumed to have the right to a childhood of innocence and freedom from the responsibilities of the adult world. Thus responsible adults have a duty to protect children from dangerous knowledge and people, and in normal circumstances children are not expected to contribute economically to their households or the care of others.”).

82. Appell, *supra* note 62, at 708.

83. Appell, *supra* note 15, at 722 (“Childhood as it exists today is, of course, an ideological construct, arising out of Enlightenment philosophy and, most specifically, liberal political and moral theory. This ideology establishes children as subjects without wisdom, knowledge, or political, moral, or legal competence, and thus excludes them from governance and self-determination. Adults, in contrast, presumptively possess these attributes and powers.”) (internal citations omitted).

84. WILLIAM S. BUSH, WHO GETS A CHILDHOOD: RACE AND JUVENILE JUSTICE IN TWENTIETH-CENTURY TEXAS 4 (2010); Owain Jones, *Melting Geography: Purity, Disorder, Childhood and Space*, in CHILDREN’S GEOGRAPHIES: PLAYING, LIVING, LEARNING 28, 34 (Sarah L. Holloway & Gill Vallentine eds. 2000).

85. BUSH, *supra* note 84, at 4.

were developed to serve children.⁸⁶ In sum, early 19th century reformers enacted policies based on the emergent view “that a child’s life should be characterized by education, play and exploration rather than adult responsibilities such as wage labor or early marriage.”⁸⁷

This view of childhood as a developmental period of innocence and immaturity, however, was not consistent or racially universal. Rather, race and gender played a critical role in allocating the benefits and burdens of childhood. In the United States, as the notion of the innocent, developmental child emerged, white children began to enjoy greater protections while Black children’s position remained relatively unchanged. This is exemplified by the ways in which state and local governments began to enact some of the first laws regulating child labor while Black children were still enslaved.⁸⁸ While local communities established public and private schools to educate white children, enslaved Black children were prohibited from learning to read or write.⁸⁹ Following Reconstruction, Black children were subject to mandatory apprenticeship requirements notwithstanding the emergent child labor laws. These examples demonstrate the ways in which, as Robin Bernstein notes in *Racial Innocence*, notions childhood innocence and dependency were “raced white” and produced “a busy cultural system linking innocence to whiteness through the body of the child.”⁹⁰ In other words, constructions of childhood were deeply racialized, and Black children were largely excluded.

b. Construction of a Liminal Childhood: Negating Childhood Through Enslavement

The racialization of innocence and the liminal childhood experience is inextricably bound up with the history of chattel slavery. For example, a central component of childhood is the right to parental care. Slavery, however, was predicated on the alienation of kinship ties between children and their parents, as parents of Black children were denied any right to control decisions regarding if and how their child would engage in labor.⁹¹ Because Black children did not be-

86. JAMES & JAMES, *supra* note 16, at 12.

87. BUSH, *supra* note 84, at 4.

88. See Nunn, *supra* note 25, at 680.

89. See MANNING MARABLE & LEITH MULLINGS, LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM AND RENEWAL 41 (2003); Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 102 (1991).

90. BERNSTEIN, *supra* note 42, at 6.

91. At the same time, however, childhood was used to justify the enslavement of African Americans more generally. Indeed, the enslavement of African Americans was justified by the childlike na-

long to their parents, they could be separated from them at the whim of the slave owner. As Hortense Spillers notes, kinship lost its meaning in this context “since it can be invaded at any given and arbitrary moment by the property relations.”⁹²

During this era, childhood was not only a racialized construct; it was gendered as well. The sexual and physical exploitation Black girls experienced during enslavement separated them from the characteristics associated with the gendered form of childhood known as girlhood.⁹³ According to one scholar, “[g]irlhood is understood in terms of gender and sex, but preadolescent girls are, in most societies, situated outside the boundaries of sanctioned sexual activity. Girlhood, in particular, continues to be linked to purity, innocence, chastity, and virginity.”⁹⁴ Enslaved Black girls were constructed in opposition to the prevailing understanding of girlhood, often described as seductresses, labeled prostitutes and blamed by white mistresses for their husbands’ infidelity.⁹⁵ As historian Cheryl Hicks notes, “[i]n the context of American slavery, antebellum southerners accepted the image of the sexually insatiable enslaved woman, thereby characterizing all white men as victims of sepiu tempresses.”⁹⁶ Consequently, Black girls were regarded in ways that were similar to Black women. Being both Black and female, like Black women, Black girls were denied access to notions of femininity and womanhood. As Cheryl Harris notes, “in contrast to the image of white womanhood formulated by nineteenth-century ideology—the ‘delicate, sexually pure, [Lady] . . . [d]ependent and deferential to men’—Black women were portrayed as dominant, aggressive, and, except for the matriarchal figure, Mammy, sexually promiscuous.”⁹⁷

ture of Blacks, such that whites needed to act as stewards of their labor. See, e.g., Nunn, *supra* note 25, at 680; Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 698 (2000).

92. Spillers, *supra* note 69, at 74.

93. MEENAKSHI GIGI DURHAM, QUVENZHANE AND THE COMEDIANS: BLACK GIRLHOOD AND SEXUALITY AT THE “EDGE” OF MEDIATED HUMOR, COMMUNICATION, CULTURE & CRITIQUE 10 (2015) (stating that girlhood is a theoretical category, articulated to different vectors in different sites and contexts, but it is generally perceived as “a stage to be passed through on the way to something else—mostly to ‘being a woman’”); Treva B. Lindsay, “One Time for My Girls”: African-American Girlhood, Empowerment and Popular Visual Culture, 17 J. AFR. AM. ST. 22, 22–24 (2012); Marnina Gonick, *Between “Girl Power” and “Reviving Ophelia”: Constituting the Neoliberal Girl Subject*, 18 NWSA J. 1 (2006) (asserting that the literature on girlhood has constructed a false dichotomy that portrays girlhood as either vulnerable or assertive).

94. DURHAM, *supra* note 93, at 10.

95. See Saidiya V. Hartman, *Seduction and the Ruses of Power*, 19 CALLALO 537, 544 (1996).

96. Cheryl D. Hicks, “Bright and Good Looking Colored Girl”: Black Women’s Sexuality and “Harmful Intimacy” in Early Twentieth-Century New York, 18 J. HIST. & SEXUALITY 418, 426 (2009).

97. Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 313 (1996) (internal citations omitted).

Over time, the construct of the lascivious, aggressive Black female cohered into the image of the jezebel. The jezebel image projected Black women and girls as possessing an uncontrolled and uncontrollable sexual appetite, unrestrained by morality or social convention. According to Patricia Hill Collins, the jezebel “function[ed] to relegate Black women to the category of sexually aggressive women, thus providing a powerful rationale for the widespread sexual assaults by white men typically reported by Black slave women.”⁹⁸ Black females were viewed as property and therefore lacking ability to withhold consent or as inherently promiscuous and therefore incapable of withholding consent to sex. The consequences of this construct of Black femaleness came into sharp relief in a 1855 case called *Missouri v. Celia, a Slave*.⁹⁹ There, a nineteen-year-old enslaved Black girl named Celia was convicted of murdering her owner. Celia, however, alleged that she killed him in self defense, after he sexually assaulted her from age fourteen to nineteen. The court rejected Celia’s self-defense claim. Instead, the trial court ruled that Celia did not constitute “a woman” as described in the state rape statute and therefore had no right to resist. The exclusion of enslaved girls and women from the protection of rape law normalized sexual violence and reinforced the construction of Black femininity as sexually deviant. Moreover, although the autonomy and agency of enslaved Black women was generally denied and used as a basis for their exploitation, Celia’s treatment demonstrates the ways in which agency could be selectively invoked for the purposes of criminal prosecution.¹⁰⁰ This construction facilitated what Saidiya Hartman describes as “inextricable link between racial formation and sexual subjection.”¹⁰¹ Criminalization was foundational not only to this subjugation but to the extension of a partial form of autonomy to Black women and girls.

Like Celia, Black girls were deeply affected by such constructs and the sexual assaults such constructs justified. Indeed, the narratives of enslaved Black women and girls are replete with accounts of sexual victimization. In *Life of a Slave Girl*, one of the most significant slave narratives of its era, Harriet Jacobs re-

98. COLLINS, *supra* note 48, at 81 (internal citations omitted).

99. Hartman, *supra* note 95, at 539–40 (discussing the 1855 prosecution of a nineteen-year-old enslaved Black woman named Celia, who was accused of killing her white master after he attempted to rape her). For additional discussion of the case, see David O. Linder, *Celia, a Slave, Trial (1855): An Account*, UMKC SCH. L., http://law2.umkc.edu/faculty/projects/ftrials/celia/celia_account.html (last visited July 31, 2015).

100. Hartman, *supra* note 95, at 540 (“The slave was recognized as a reasoning subject, who possessed intent and rationality, solely in the context of criminal liability; ironically the slave’s will was acknowledged only as it was prohibited or punished.”); see also *U.S. v. Amy*, 24 F. Cas. 792, 810 (Va. Cir. 1859) (“In expounding [the] law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property.”).

101. Hartman, *supra* note 95, at 543.

peatedly describes the sexual violence she experiences at the hands of her master beginning in adolescence and extending into adulthood.¹⁰² Thus, during the era of enslavement, the liminal status occupied by Black girls was established; the stereotypes of sexual maturity and promiscuity were projected on to that status, providing cover for the kinds of sexual assaults described by Jacobs. Consequently, Black girls existed, as Salamisha Tillet notes, in a “particularly estranged and subordinate position.”¹⁰³

c. Separate and Unequal: Liminal Childhood in the Era of Jim Crow Punishment

Although slavery was abolished in 1865 with the enactment of the Thirteenth Amendment, the liminal construct of Black childhood continued to shape the perceptions and treatment of Black girls. During this post-Civil War era, states began to enact criminal laws that sought to regulate African Americans and return them to a state of servitude through the imposition of criminal punishment.¹⁰⁴ As I have noted elsewhere, through these laws, which became known as the Black Codes, “Southern states criminalized a range of conduct thought to be committed by former slaves. These crimes included vagrancy, absence from work, the possession of firearms, insulting gestures or acts, familial neglect, reckless spending, and disorderly conduct. Blacks were also prosecuted for the failure to perform under employment contracts.”¹⁰⁵

Black children, including Black girls, were not exempted from criminalization under this system of racial control. Indeed, Black children were particularly vulnerable to prosecution under apprenticeship statutes that required them to be supervised by an employer.¹⁰⁶ According to Jill Hasday, “more than twenty-five hundred children were so ‘apprenticed’ within the first month after emancipa-

102. Woodhouse, *supra* note 91, at 693.

103. SALAMISHAH TILLET, *SITES OF SLAVERY: CITIZENSHIP AND RACIAL DEMOCRACY IN THE POST-CIVIL RIGHTS IMAGINATION* 24 (2012).

104. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009) (describing the use of the criminal law to regulate newly freed African Americans in southern prison camps); DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997).

105. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1262 (2012).

106. See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1339 (1998); Nunn, *supra* note 25, at 680 (“Although most apprenticeship statutes were repealed by the 1870s, African American children continued to work on farms and in factories in much greater numbers and at much greater risks than white children.”).

tion, often to their former masters.”¹⁰⁷ These forms of punishment, however, were predicated on the assumed agency possessed by Black children, which was denied in the context of slavery, but used to facilitate subordination through criminalization in the post–Civil War era.¹⁰⁸ Such constructions infused Black children with contradictory characteristics of both childhood and adulthood that at once placed them outside the protections of childhood and inside the punitive posture of the criminal law. The erasure of the border between criminal culpability and childhood was part and parcel not only to the marginalization of Blacks within the broader category of child, but to efforts to reinforce the racial marginality of Blacks more generally. As such, criminalization was embedded into the marginal forms of childhood experienced by Black children.

Indeed, such racially specific regulations were not applicable to white children; in fact, for white children, the trend was moving in the opposite direction. In the late 1800s, states began to undertake efforts to protect white children from exploitative labor conditions and to provide for specialized systems of juvenile justice. Black children, however, were not protected by such labor laws nor by notions of innocence and dependency; rather their dependency was used as a justification for criminalization. In so doing, Black children’s liminal childhood status was reinforced, as they existed both inside and out of the category of child.

Additionally, Black girls experienced particular forms of both racialized and gendered punishment that reinforced their marginalization not only within the category of child, but also within the category of female.¹⁰⁹ Indeed, constructs of Black female promiscuity and the need to police deviant sexuality was a significant rationale for state supervision and control of Black women and girls. In 1908, the Georgia legislature amended state law in order to preclude females from being sentenced to chain gangs.¹¹⁰ Nevertheless, as historian Sarah Haley notes, over two thousand Black women and girls were sentenced to the chain gang, often for prostitution or other moral offenses, while only four white women were sentenced to the chain gang during the same period.¹¹¹ Instead, white

107. Hasday, *supra* note 106, at 1354.

108. Hartman, *supra* note 95, at 540.

109. Ocen, *supra* note 105, at 1259.

110. See Sarah Haley, “*Like I Was a Man*”: *Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia*, 39 SIGNS 53, 56 (2013); TALITHA LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 51 (2015); Kittling, *supra* note 11, at 919.

111. See Talitha LeFlouria, “*The Hand That Rocks the Cradle Cuts Cordwood*”: *Exploring Black Women’s Lives and Labor in Georgia’s Convict Camps, 1865–1917*, 8 LAB. 47, 54 (2011) (“African American women were arrested for a wide range of offenses including larceny, gambling, bootlegging liquor,

women and girls suspected of crimes such as prostitution were viewed as innocent victims of the immorality of men and directed out of the criminal justice system. According to Haley, “[e]ach year between 1893 and 1900 more black girls and young women between the ages of fifteen and twenty were arrested than white boys and white girls in the same age group combined.”¹¹² In this context, “punishment signaled . . . the degraded status [of Black women], while the insulation from punishment signaled the valorization of white women.”¹¹³

d. Jim Crow Justice and the Creation of the Juvenile Delinquency System

The racialized and gendered punishments experienced by Black girls persisted in this era despite radical reforms to penal institutions, including the development of institutions designed to serve women and children. For much of early American history, adults and children (including Blacks) were punished by and housed in unitary carceral institutions. Such practices, however, gave way to the demands of progressive reformers for the establishment of a specialized system of juvenile justice.¹¹⁴ As one scholar noted, “[t]he juvenile court primarily focused on delinquency matters, leaving the needs of parentless or maltreated children to the philanthropy of orphanages and their supporters.”¹¹⁵ The juvenile justice system was designed to provide a separate legal regime for children adjudicated as delinquents.¹¹⁶ As Kevin Lapp has observed, the juvenile justice system “protected juveniles from the criminal process and its severe punishments and stigma, replacing adversarialness and procedural formality with judicial discretion and cooperative, individualized treatment that preferred rehabilitation and training over punishment.”¹¹⁷ Children within the juvenile justice system were to be provided with education, guidance, supervision, and other opportunities for redemption and rehabilitation, not punishment.¹¹⁸ Moreover, juvenile courts were tasked with regulating noncriminal juvenile misbehavior, known as status offenses, in an effort to address harmful conduct before it crossed the threshold into

adultery, fighting, drunkenness, vagrancy, prostitution, and ‘disorderly conduct.’”); Ocen, *supra* note 105, at 1265.

112. SARAH HALEY, *ENGENDERING CAPTIVITY: RACE, GENDER AND PUNISHMENT AFTER THE CIVIL WAR* 35 (forthcoming 2016) (manuscript on file with author).

113. Ocen, *supra* note 105, at 1259.

114. See Scott, *supra* note 64, at 578.

115. Akhila L. Ananth, *The Gracious Spaces of Children’s Law: Innocence and Culpability in the Construction of a Children’s Court*, 63 *STUD. L. POL. & SOC’Y* 89, 95 (2014).

116. See generally GEOFF K. WARD, *THE BLACK CHILD SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE* 19–46 (2012).

117. Lapp, *supra* note 9, at 77–78.

118. See, e.g., Nanda, *supra* note 45, at 1513.

criminality. As a result of this reform movement, many reformatories were established during the early part of the twentieth century.¹¹⁹

It was also during this era that the juvenile justice system developed specific practices designed to respond to female delinquency,¹²⁰ as adolescent girls were seen as particularly vulnerable to being sexualized and exploited.¹²¹ Here, “the practice of female juvenile justice reflected the quasi-utopian, ultimately repressive, pursuit of Progressive-era reformers for a more ‘pure’ society, as revealed in the eugenics, anti-prostitution, and sex-education campaigns.”¹²² Given this orientation, it is unsurprising that the lofty ideals animating the creation of the juvenile justice system soon gave way to the patriarchal and racial norms of the day. The juvenile justice system was therefore designed to protect the sexual chastity and domesticity traditionally associated with girlhood.

Indeed, the juvenile systems designed to address female conduct evolved over time as a mechanism to control the sexuality of wayward girls.¹²³ According to Tera Agyepong, “[i]n the first stage of reform efforts, which began in the 1880s, women reformers worked to criminalise sex with young girls by raising the age of consent. These efforts were framed as protective, as they challenged the widespread perception of ‘fallen women’ as depraved and dangerous by portraying girls as victims of male lust and exploitation.”¹²⁴ As a result of the focus on the sexuality of girls as a means of protection, girls were most often charged with morality offenses. To be charged with such a crime, a girl did not need to engage in a sex act. Rather, “a girl had to only show ‘signs’ in her appearance, conversation and bearing that she had probably had intercourse in the past or might do so in the near future.”¹²⁵ Girls convicted of such morality offenses were far more likely than boys to be sent to reform institutions.¹²⁶ The efforts aimed at redeeming girls, however, were inflected by race, as white girls were the primary objects

119. See Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDU. REV. 65, 70 (1978).

120. *See id.*

121. See Tera Agyepong, *Aberrant Sexualities and Racialised Masculinisation: Race, Gender and the Criminalisation of African American Girls at the Illinois Training School for Girls at Geneva, 1893–1945*, 25 GENDER & HIST. 270, 273 (2013).

122. Schlossman & Wallach, *supra* note 119, at 68.

123. Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1590 (2012) (“Accounts of girls’ treatment in the late 1800s and early 1900s show that the juvenile justice system frequently intervened to save wayward girls from perceived futures in prostitution or criminality and redirect them toward marriage, motherhood, and home life. Girls in need of intervention were seen as both sexually vulnerable and sexually precocious; the system’s role was to instill in them appropriate morality”).

124. Agyepong, *supra* note 121, at 273.

125. Schlossman & Wallach, *supra* note 119, at 72.

126. *See id.* at 72.

of concern.¹²⁷ As such, “notions of childhood innocence and rehabilitation were not universal, but circumscribed by race.”¹²⁸

While white girls were viewed as innocent and therefore designated as victims, Black girls were viewed as deviant offenders. Consequently, Black girls were disproportionately represented in female reformatories while white girls were often given non-custodial sentences such as probation.¹²⁹ For example, at the Illinois Training Institute for Girls, established in 1893 as one of the early juvenile justice institutions dedicated to rehabilitating and protecting girls, Black girls were disproportionately represented, accused of engaging in delinquent behaviors related to sexual immorality and subject to punitive, rather than rehabilitative, practices.¹³⁰ In one Chicago reformatory institution in 1937, Black girls represented approximately 75 percent of the population, largely adjudicated for offenses of sexual immorality.¹³¹ Moreover, as historian Cheryl Hicks notes, even when Black girls were arrested for offenses similar to white girls, they often served their time in state penal institutions with harsher environments, rather than on probation or in local institutions designed to provide moral guidance to wayward young women.¹³² For Black girls in these systems, the stereotypes of sexual maturity, agency and criminality that accompanied their liminal status effectively negated the construct of the immature and dependent children that juvenile institutions were designed to serve.

Indeed, as Agyepong notes, “[u]nlike the image of a fixable, inherently innocent delinquent that spurred the child-saving movement and brought all persons under the age of eighteen into the protective and rehabilitative folds of the juvenile justice system, images of African American girls connoted inherently deviant, unfixable and dangerous delinquents whose negative influences resulted in

127. BUSH, *supra* note 84, at 73–75 (describing campaign to establish a juvenile detention facility in Houston, Texas, and describing how when confronted with increasing rates of sexually transmitted diseases, reformers called for clinical services for sexually active girls, while treating expressions of sexuality among Black girls as a “threat to public safety” warranting “a law and order solution”).

128. Agyepong, *supra* note 121, at 271.

129. *See id.* at 274–75; BUSH, *supra* note 84, at 74 (noting that Black reform institutions for girls were either non-existent or overcrowded, which meant that Black girls were often housed in county jails, and that if Black girls could get into juvenile reform institutions, they were often segregated).

130. *See id.* at 274, 276–77.

131. *See id.* at 275.

132. Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws, 1917–1928*, 151 U. PA. L. REV. 2077, 2092 (2003) (“Black women failed to receive probation at the same rate as white women and were often rejected from mainstream social welfare efforts because of the discriminatory policies of court officials and local reformatories. . . . [T]he support mechanisms that encouraged preventative rehabilitation rather and punitive incarceration were less available to black women.”).

the contamination of other children.”¹³³ Black girls confined to juvenile institutions were often viewed as more sexually promiscuous and prone to acts of physical violence.¹³⁴ Within these institutions, Black girls were blamed for rather than protected from sexual relationships with adult staff members.¹³⁵ Because Black girls were viewed as physically aggressive and sexually promiscuous, officials feared that they would have a corrupting influence on white girls within these juvenile institutions, and so they often segregated Black girls from their white counterparts and subjected them to harsher conditions or more restrictive facilities.¹³⁶ These patterns of disproportionate representation and practices of racialized punishments within female institutions reinforced the marginal status of Black girls within the broader category of childhood.

In many ways, the denigration of Black female sexuality during slavery, the criminalization of Black women for moral offenses in the post-Civil War era and the discriminatory operation of the early juvenile reform institutions established the framework for the discriminatory treatment of Black girls. In other words, the ongoing subordination of Black girls was facilitated through these early constructs of childhood. In particular, the various forms of state violence that attended to the bodies of black girls were justified by racially and gender specific form of childhood assigned to them. Criminalization was an essential part of this liminal status, as it reinforced racial and gender stereotypes while simulatenously imposing particular forms of culpability that were generally understood to be inconsistent with childhood status occupied by Black girls.

II. LIMINAL CHILDHOOD AND TRENDS: GOVERNMENTAL EFFORTS TO COMBAT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

Indeed, liminal childhood—the simultaneous inclusion and exclusion of Black girls from the social category of the child as a result of stereotypes of sexual maturity, adult-like agency and criminality—continues to have resonance in anti-trafficking policies that are normatively grounded in childhood immaturity, innocence and sexual purity. As will be described below, the liminal childhood status attached to Black girls is embedded in the historical and contemporary legal frameworks that define what constitutes child sex trafficking and who may be

133. Agyepong, *supra* note 121, at 272.

134. See Cheryl N. Butler, *Blackness As Delinquency*, 90 WASH. U.L. REV. 1335, 1386–87 (2013).

135. See Agyepong, *supra* note 121, at 272; Hicks, *supra* note 132, at 2094 (“While the law did not designate institutional care based on race, administrators’ ideas about black people and sexuality pervaded reports that justified the exclusion or separation of black from white (both native and immigrant) women.”).

136. See Hicks, *supra* note 132, at 2094.

regarded as its victims. As a result, Black girls are often underprotected by these statutory regimes, instead more likely to be punished for prostitution as compared to their non-Black counterparts.

A. Historical Regulation of Race and Sexuality Through Antitrafficking Initiatives

The United States has a long history of racialized perceptions of and prohibitions against sexual trafficking of women and girls. For example, in 1910, the federal government enacted the first anti-sex trafficking law, titled the White Slavery Traffic Act,¹³⁷ out of a concern about immorality and so-called white slavery involving white girls being moved across state lines for the purposes of prostitution. The White Slavery Traffic Act, which came to be known as the Mann Act, prohibited the knowing transportation of “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose” through interstate or foreign commerce.¹³⁸ According to a U.S. House of Representatives report on the legislation, the Act “does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.”¹³⁹ Thus, the report stated, “[t]he term ‘white slave’ includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude.”¹⁴⁰

The proponents of the Mann Act, however, sought to do more than simply regulate the sexual trafficking of white girls; they sought to punish what they believed to be a growing trend of sexual immorality among whites and to reduce immigration.¹⁴¹ Proponents cast white women and girls as unwilling participants in sex work because they were viewed as naturally chaste and virtuous. As such, white women were deemed incapable of consent to such immorality and were therefore in need of protection by the federal government.¹⁴² Indeed, “[t]he Pro-

137. 18 U.S.C. § 2421 (2012).

138. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POLY 99, 108 n.66 (1996).

139. Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 6 (1999).

140. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 789 (2006).

141. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3015 (2006).

142. See Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1115–16 (1984).

gressive Era reformers who supported the Act had used the words ‘white slavery’ to promote the vision of women held in bondage against their will, of mysterious druggings and abductions of helpless young girls, and of unexplained disappearances of innocent and naïve immigrants forced into lives of prostitution and vice.”¹⁴³

From the descriptive account of trafficking that generated the legislation to the naming of the legislative act, the preservation of the “virtue” of white girls was a central objective of antitrafficking advocates. Despite the allusion to chattel slavery, Black girls were wholly absent from the discourse surrounding trafficking. The motivation for the statute and the language used to codify these intentions drew upon the liminal status of Black girls, particularly stereotypes of Black female sexual immortality and criminality, to justify their exclusion from protection. While prostitution was assumed to be contrary to the essential nature of virtuous white women and girls, prostitution was seen as an extension of the assumed immoral nature of Black women and girls. Black women and girls were not viewed as victims of trafficking but rather as inherently lascivious and willing participants in criminal sex acts.

As I note in Part I, Black women and girls were instead subject to arrest, prosecution, and incarceration for prostitution-related offenses. Rather than receiving protection under the Mann Act, Black women and girls were stereotyped as sexually deviant,¹⁴⁴ targeted by law enforcement and disproportionately criminalized. Through the deployment of what historian Cheryl Hicks calls “racial constructions of sexuality,” Black women and girls were subject to a near constant state of surveillance, which made them vulnerable to arrest for prostitution for conduct as innocuous as merely walking down the street alone or for congregating as a group.¹⁴⁵ In short, their femaleness combined with their blackness to signal innate deviance and promiscuity.¹⁴⁶

143. *Id.* at 1111.

144. Hicks, *supra* note 96, at 428.

145. *Id.* (describing the arrest of a twenty-three-year-old Black woman who “was walking to her apartment . . . [when] a car stopped at the curb, and four men, claiming that they were the police, pulled her in and, according to her, without any reason . . . declared that she was guilty of prostitution”).

146. *Id.* at 419; Cecily Devereux, “*The Maiden Tribute*” and *the Rise of the White Slave in the Nineteenth Century: The Making of an Imperial Construct*, 26 VICTORIAN REV. 1, 3 (2000) (noting that the antitrafficking legislation of the early twentieth century “acted as a condenser of anxieties about shifting race, sex, and gender relations”).

B. Contemporary Problems and Efforts to Combat Commercial Sexual Exploitation of Children

Contemporary anti-child trafficking initiatives have inherited much from their early 20th century forebearers. While the most recent federal and state prostitution and antitrafficking laws are not explicitly racialized, they nevertheless rely upon racialized and gendered constructs of childhood in framing the normative basis for state intervention and the scope of protection afforded to affected children.

1. Federal Law

In the face of growing concern regarding international sexual and labor trafficking of vulnerable populations, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA).¹⁴⁷ The Act was designed to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”¹⁴⁸ The TVPA Congressional Reports note, based on CIA estimates, that approximately fifty thousand people were victims of trafficking each year.¹⁴⁹ The bill was passed with overwhelming bipartisan support, signed into law by President Bill Clinton, and later enthusiastically embraced by President George W. Bush.¹⁵⁰ Under the Act, those found guilty of trafficking adults by means of force, fraud, or coercion can face a minimum of 15 years in prison. Those convicted of child sex trafficking face a minimum of 10 years imprisonment if the child was over the age of 14 or a minimum of 15 years imprisonment if the child was under the age of 14.¹⁵¹

With respect to child sex traffickers, the government does not need to prove that the trafficking occurred as a result of force, fraud or coercion.¹⁵² This defini-

147. Pub. L. No. 106-386, 114 Stat. 1464 (2000).

148. 22 U.S.C. § 7101(a) (2006).

149. See AMY O'NEILL RICHARDSON, CTR. FOR STUDY INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (Nov. 1999), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>.

150. See Chacón, *supra* note 141, at 2990.

151. 18 U.S.C. § 1591(b)(1) (2012). With regard to children under the age of 14, individuals can face up to life imprisonment for recruiting a child for purposes of sexual exploitation, even if the actual sexual exploitation never occurs. See 18 U.S.C. § 1591(b)(2) (2012). Under this statutory framework, Congress likely enhanced penalties for trafficking of minors under the age of 14 because such children are seen as particularly vulnerable and the conduct as particularly egregious.

152. See *id.*

tional choice is rooted in concerns that children are more vulnerable than adults to abuse and cannot consent to sex due to their age. Thus, as a formal matter, any person under the age of eighteen who engages in commercial sex should be designated as a victim of a severe form of trafficking and should be extended the protections authorized by the Act.

Although the TVPA of 2000 articulates the harm of trafficking in broad terms, the primary evil the legislation sought to combat was the international trafficking and exploitation of vulnerable people, particularly women and children. Often, vulnerable women and children were described not only as foreign, but non-Black. Policy advocacy groups promoted the image of European or Asian girls unwittingly being brought from their homelands to the United States for purposes of sexual exploitation. In one child sex trafficking report issued by Soroptomist International, a global women's rights organization, the cover features a young white girl in a close up photo, looking pensively at the camera.¹⁵³ The report begins with the story of Natalya, a girl who was sexually trafficked from Moldova, a small European country.¹⁵⁴ By using Natalya's story to condemn what the report called "modern day slavery," Black girls were wholly invisible, reflecting a racialized construct of child victims of trafficking. The absence of Black girls suggests that only a select class of children, those that fit the racialized mold articulated by advocacy groups, are to be considered victims. Those that fall outside of the narrow construct of child and victim are to be prosecuted under traditional juvenile prostitution statutes.

The construction of the paradigmatic victim as foreign and non-Black is reflected not only in policy reports but also in the legislative debates, which referenced stories of trafficking victims who were kidnapped from their countries of origin, and in the kinds of remedies available to victims of trafficking. In particular, the TVPA directs the federal government to provide resources to foreign governments and organizations to combat trafficking and provides temporary visas or permanent resident status to qualifying victims of trafficking.¹⁵⁵ The temporary visas authorized by the TVPA allow confirmed victims of "severe forms of trafficking" to remain in the United States if they cooperated with every "reasonable request for assistance" by law enforcement in the investigation and prosecution of their traffickers.¹⁵⁶ These kinds of remedies are not applicable or not helpful to U.S.-born trafficking victims.

153. SOROPTOMIST INT'L AM., THE NEW FACE OF SLAVERY: A SOROPTOMIST WHITE PAPER (2007), <http://www.soroptimist.org/whitepapers/whitepaperdocs/wpnewfaceslavery.pdf>.

154. *Id.* at 1.

155. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012).

156. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2012).

Subsequent amendments to the TVPA did, however, anticipate domestic victims of trafficking, as the TVPA instructs the Secretary of State and the Attorney General to work with organizations to provide services to U.S. citizen victims of human trafficking.¹⁵⁷ Nevertheless the invisibility of Black girls, who constitute the majority of trafficking victims, persisted in subsequent iterations of the TVPA through the description of “the ideal victim.” Indeed, the public campaigns to enhance protections for sexually trafficked children and increased penalties for traffickers were infused with descriptions of the kinds of girls who are trafficked as “Little Barbies” and “the Girl Next Door.”¹⁵⁸ These phrases were designed to invoke outrage for the loss of childhood innocence and empathy for victims. Images of white girls were deployed as a stand in for both. For example, a Vanity Fair article on the subject, titled *Sex Trafficking of Americans: Girls Next Door*, an image of a white girl on a mattress, her face obscured, accompanies the article.¹⁵⁹ A *New York Times* article highlighting the plight of sexually trafficked children was similarly titled. These images and descriptors are not only used in the media and public awareness campaigns, they have been embraced by federal law enforcement.¹⁶⁰ For example, an FBI webpage on the subject cites each of these stories and embraces the “Girl Next Door” victim construct. The face associated with the issue of child sexual trafficking on the FBI webpage is that of a frightened white girl. Invocation of descriptors such as “the Girl Next Door” and “Little Barbie” to describe the paradigmatic victim of trafficking reinforces the ideal victim as a child who is white and exemplifies “chastity, and obedience to parental and state authority.”¹⁶¹

Within this discursive and statutory framework, dependency, innocence, and sexual immaturity were gendered female and race white. The liminal childhood assigned to Black girls was incompatible with this raced and gendered framing. As a consequence, Black girls are excluded from constructs of the paradigmatic victim of child-sex trafficking despite the fact that they are disproportionately targeted by exploiters. Thus, although Black girls are disproportionately represented among detected victims of sexual trafficking, they are often not treated as such by the juvenile or criminal justice systems. Rather, Black victims of sex trafficking are more likely to be prosecuted and incarcerated for prostitution than to be protected under the TVPA or similar state laws, which are largely shaped by

157. See 22 U.S.C. § 7105(b) (2012).

158. Amy Fine Collins, *Sex Trafficking of Americans: The Girls Next Door*, VANITY FAIR, May 2011.

159. *Id.*

160. Peter Landseman, *The Girls Next Door*, NY TIMES (Jan. 25, 2004), <http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html>.

161. Cynthia Godsoe, *Punishment As Protection*, 52 HOUS. L. REV. 1313, 1367 (2015).

law enforcement discretion. For example, sexually trafficked minors may be designated as confirmed victims of a “severe form of trafficking” upon the discretion of law enforcement.¹⁶² In many cases, however, law enforcement officers often use their discretion to categorize Black girls as juvenile delinquents (and thus subject to regulation by the juvenile justice system) instead of victims.¹⁶³

2. State Law

Although the TVPA establishes guidelines for the treatment of sexually trafficked children, most of the detection, arrests, and adjudications of children who are commercially exploited occur at the state and local level. The states’ approaches to regulating prostituted children, however, vary significantly.¹⁶⁴ The varying approaches to child sexual exploitation reflect a broader conflict over the construction of childhood and perceptions of adolescents who are the subject of exploitation. For example, states across the country have established an age below which a child cannot consent to sex.¹⁶⁵ Such statutes, which range between the ages of twelve and eighteen,¹⁶⁶ are, as Wendi Adelson notes, designed “to protect minors from sexual intercourse” and to “protect minors below a certain age from predatory, exploitative sexual relationships.”¹⁶⁷ Yet in most states, minors can be arrested for prostitution¹⁶⁸ if they sell sex for money at the discretion

162. See Javidan, *supra* note 31, at 378–79.

163. See *id.* at 378; see also Nanda, *supra* note 45, at 1505.

164. See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking*, 6 U. ST. THOMAS L.J. 96, 97 (2008); Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 437 (2009) (“Since 2003, thirty-nine states have adopted their own anti-trafficking criminal provisions. Because of the time and resources required to prove force, fraud, and coercion, however, prosecutors rarely charge defendants under these statutes”); *2014 State Ranking on Human Trafficking Laws*, *supra* note 10 (finding that twenty-two states had comprehensive safe harbor laws that provided immunity from prosecution for sexually exploited children).

165. California establishes the age of sexual consent at eighteen. See CAL. PENAL CODE § 261.5 (West 2014) (“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, a ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age.”). In comparison, Louisiana has set the age of consent at age seventeen. See LA. REV. STAT. ANN. § 14:80 (2012) (“A person who is seventeen years of age or older has sexual intercourse, with consent, with a person who is thirteen years of age or older but less than seventeen years of age, when the victim is not the spouse of the offender and when the difference between the age of the victim and the age of the offender is four years or greater.”).

166. See Adelson, *supra* note 165, at 107.

167. *Id.*

168. Prostitution is generally defined in one of two ways: “(1) prostitution (to unlawfully engage in sexual relations for profit) and (2) assisting or promoting prostitution (to solicit customers or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise as-

of law enforcement.¹⁶⁹ This contradictory approach means that if an adult has sex with a child, that is statutory rape and the adult is subject to criminal penalties. The child is the victim. Yet, if the adult pays for sex with a child, this is deemed to be prostitution and the minor will be subject to arrest. The child is the offender. Since the enactment of the TVPA, however, some state and local agencies have launched efforts to reclassify prostituted children as victims of sex trafficking, often as a result of the infusion of federal resources authorized by the TVPA.¹⁷⁰ Like the TVPA, however, such state policies are shaped by racialized and gendered constructs of childhood.

a. Criminalization of Juvenile Prostitution

In the majority of states, children may be prosecuted for prostitution at the discretion of law enforcement.¹⁷¹ Courts that have considered the question have reasoned that allowing prosecutions of minors for prostitution is not barred by separate criminal age of consent statutes.¹⁷² As a consequence of the punitive approach to juvenile prostitution, thousands of children are subject to arrest and prosecution. The Office of Juvenile Justice and Delinquency Prevention estimates that approximately 1000 juveniles are arrested for such offenses on an annual basis.¹⁷³ If a child is arrested and prosecuted for a prostitution offense, they may be sentenced to incarceration or probation.¹⁷⁴ As I note in Part III, studies have found that Black girls are disproportionately represented amongst children arrested for prostitution.

sist or promote prostitution.” DAVID FINKELHOR AND RICHARD ORMROD, PROSTITUTION OF JUVENILES: PATTERNS FROM NIBRS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (June 2004), <https://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf>.

169. See Todres, *supra* note 15, at 1110.

170. See U.S. DEP’T JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS (Aug. 2010) (describing federal coordination and funding to local and state agencies combating child sexual exploitation).

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

172. *Id.* (upholding a 12 month sentence for a 12 year old girl prosecuted for a prostitution offense).

173. *Estimated of Number of Juvenile Arrests, 2012*, OFF. JUV. JUST. & DELINQ. PROTECTION, <http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp> (last visited July 31, 2015) (estimating that 800 juveniles were arrested for prostitution); *Estimated of Number of Juvenile Arrests, 2011*, OFF. JUV. JUST. & DELINQ. PROTECTION, <http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2011&text=> (last visited July 31, 2015) (1,000 juvenile prostitution arrests); *Estimated of Number of Juvenile Arrests, 2010*, OFF. JUV. JUST. & DELINQ. PROTECTION, <http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2010&text=> (last visited July 31, 2015) (1,000 juvenile prostitution arrests); *Estimated of Number of Juvenile Arrests, 2009*, OFF. JUV. JUST. & DELINQ. PROTECTION, <http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2009&text=> (1,400 juvenile prostitution arrests).

174. Godsoe, *supra* note 161, at 1329–30.

At the same time, states such as California have enacted policies to increase penalties for individuals who engage in the sexual trafficking of children.¹⁷⁵ For example, a 2012 ballot initiative, the Californians Against Sexual Exploitation Act, was passed by an overwhelming majority of California voters. Under its terms, penalties were increased for traffickers¹⁷⁶ and traffickers were required to register as sex offenders.¹⁷⁷ Moreover, state courts were authorized to levy significant fines on offenders, the proceeds of which would be directed to a victim's compensation fund for survivors of child sexual exploitation.¹⁷⁸ This law enforcement approach, however, has not been universally adopted by states across the country.

b. "Safe Harbor" Laws for Sexually Exploited Children

Some states have enacted "safe harbor" statutes that differentiate the treatment of children arrested for prostitution from that of adults.¹⁷⁹ According to the Polaris Project, a leading antitrafficking organization, "[s]afe harbor laws are intended to address the inconsistent treatment of children, raise awareness about children that have been commercially sexually exploited, and ensure that these victims were provided with services rather than a criminal conviction."¹⁸⁰ The safe harbor statutes are normatively grounded in children's innocence and lack of capacity to consent to a commercial sexual act. In Texas, for example, the state supreme court found that the inability of a minor to consent to sex precluded a prosecution for a prostitution offense.¹⁸¹ In reaching this conclusion, the court noted that "minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity."¹⁸²

Approximately twenty-two states have amended their juvenile prostitution laws to provide either immunity or supportive services to trafficked children.¹⁸³ These statutes limit the liability that may be imposed on a prostituted minor ei-

175. CAL. PENAL CODE § 236.1(c) (West 2014).

176. *See id.* § 236.1(b).

177. *See id.* § 290(a).

178. *See id.* § 236.4.

179. See Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 246 (2003).

180. *Sex Trafficking of Minors and "Safe Harbor"*, *supra* note 10.

181. *See In re B.W.*, 313 S.W.3d 818 (Tex. 2010); *see also* Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1791–94 (2012) ("[M]inors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.").

182. *In re B.W.*, 313 S.W.3d at 822.

183. *See* Adelson, *supra* note 165, at 106–07 (summarizing state approaches to commercial sexual exploitation of children).

ther through immunity or diversion to social services. Under such initiatives, minors may be provided with services such as counseling, housing and drug treatment.¹⁸⁴ Of the twenty-two safe harbor states, fifteen have enacted robust safe harbor protection to trafficked minors, providing full immunity to juveniles arrested for prostitution. For example, the state of Illinois has enacted legislation that provides immunity to minors under the age of eighteen and Connecticut extended immunity to minors below the age of sixteen.¹⁸⁵ In these states, sexually exploited children may not be subject to adjudication as delinquents, thus removing any discretion that often leads to discriminatory treatment. Instead, children must receive treatment and other services through child welfare agencies.

Seven other states, however, maintain the authority to prosecute juveniles for prostitution but allow for discretionary diversion into the juvenile dependency system instead of adjudication in the delinquency system. In New York State, children arrested for prostitution may be designated as victims of sexual trafficking and provided social services instead of punishment if they meet certain requirements and complete court mandated programs.¹⁸⁶ As victims of sexual trafficking, children are entitled to an advocate and specialized social services, such as housing.¹⁸⁷ Even if a minor qualifies for diversion, the criminal charges may be reinstated if the minor fails to adhere to the conditions of the diversionary program.¹⁸⁸ The statute, however, gives juvenile court judges wide discretion in determining whether to divert sexually exploited children out of the juvenile justice system. If a child has previously been arrested for prostitution, is unwilling to accept the court's ordered services, or violates a court order, a judge may choose to punish the child as a delinquent.¹⁸⁹ Moreover, the statute does not apply to youth over sixteen years of age. Although New York has taken an important step to protect exploited minors, the discretion inherent in this system nevertheless leaves children subject to punishment within the juvenile justice system.

184. Crile, *supra* note 181, at 1791–94.

185. Tamar R. Birckhead, *The Youngest Profession: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067–68 (2011).

186. N.Y. SOC. SERV. LAW §§ 447-a to -b (McKinney 2010).

187. *Id.* § 447-b.

188. Cheryl N. Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1287 (2015).

189. N.Y. FAM. CT. ACT § 311.4 (McKinney 2008 & Supp. 2015).

c. **Liminal Childhood and Discretion in Modern Anti-Child Sex Trafficking Initiatives**

The aforementioned approaches reflect the ambivalence associated with juvenile prostitution. Indeed, “[j]uvenile prostitutes can be viewed primarily as victims in the control of unscrupulous adults and commercial vice, but they can also be viewed as willing participants in an illegal trade and objectionable activity.”¹⁹⁰ On the one hand, minors may be arrested for prostitution or a related offense and adjudicated as a delinquent. On the other, children may only be detained and taken immediately to social services.¹⁹¹ The resolution of this ambivalence often turns on how closely aligned a child is to the ideal child sex trafficking victim in the eyes of the official tasked with enforcement of the juvenile prostitution statute. Although, this enforcement is driven by ostensibly race- and gender-neutral concerns arising from the vulnerability and innocence of childhood, as noted above, these concepts are inherently racialized and gendered, embracing an “ideal victim” that is foreign or non-Black. As a consequence, the historical constructs of Black girls as lascivious and the contemporary biases against them shape perceptions of their sexual and emotional maturity in such a way as to render them ineligible as child victims.

Historically, concerns about racialized sexual purity were built into anti-child sex trafficking statutes, which is exemplified by the naming and enforcement of the White Slavery Act of 1910. Black girls were excluded from coverage, solidifying associations between them and criminal sexual deviance. During those formative years for antitrafficking discourse and policy, the paradigmatic victim was an unsuspecting young, white girl who was trapped into a life of prostitution and whose virtue was in need of protection. Similarly, in the contemporary era, the “ideal victim” is young, white and potentially foreign. She is innocent and vulnerable; she possesses little agency and is grateful for the intervention of law enforcement.¹⁹² Those who fit the archetype are extended protections either through non-criminal interventions or non-custodial sentences. Black girls, who are stereotyped as sexually promiscuous and independent, do not fit the ideal victim mold and are therefore classified as offenders. Thus, the characteristics of Black girls enable state actors to resolve the ambivalence associated with the classification of sexually trafficked children in favor of criminalization.

In many respects, constructs of the racialized ideal victim are reconstituted in

190. FINKELHOR & ORMROD, *supra* note 168, at 2.

191. *Id.* at 1, 2.

192. See generally Javashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

the discretion that is invested in law enforcement. Discretion has long been understood as a driver of discriminatory outcomes in the criminal justice system.¹⁹³ In the juvenile context, as Cynthia Godsoe notes, the use of discretion “has frequently resulted . . . in more punitive, arbitrary, or racially discriminatory treatment of certain groups.”¹⁹⁴ Often, discretionary decisions to divert or prosecute prostituted children is driven more by the characteristics of the child or the biases of a law enforcement official than the conduct of the child or the elements of the offense. Indeed, as the Office of Juvenile Justice and Delinquency Prevention has acknowledged “some of the categorization may reflect arbitrary features such as the demeanor of the juveniles, the sympathy that individual police officers may have for them, or the policies of the jurisdiction in which the incident occurred.”¹⁹⁵ For Black girls, who are often not extended the protections of childhood, official discretion is often used to classify them as offenders.¹⁹⁶

As will be discussed below, the liminal status of Black girls within the category of child profoundly affects the enforcement of antitrafficking initiatives, often leading to racial disparities in the enforcement of punitive interventions and the underenforcement of protective measures. Thus, Black girls are more likely to be diverted into rather than out of secure institutional settings, often because of insufficient investments in therapeutic residential placements.¹⁹⁷ Even in states such as New York, with some form of protective legislation in place, a child arrested for prostitution may still be adjudicated as a delinquent while services are provided or she may be placed in a locked juvenile detention facility to prevent her from returning to her exploiter.¹⁹⁸ Consequently, even if Black girls are identified as victims, they may not experience treatment that is significantly different than designated offenders. Rather, the liminal status of Black girls prevents them from accessing the protections of the state.

193. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 27 (1998).

194. Godsoe, *supra* note 161, at 1335.

195. FINKELHOR & ORMROD, *supra* note 168, at 4.

196. See, e.g., Rachel Lloyd, *Shut Up and Sing: Why #BlackLivesShouldMatter and How This Impacts the Anti-Trafficking Movement*, GEMS (Dec. 4, 2004, 1:16 PM), <http://www.gems-girls.org/shifting-perspective/shut-up-and-sing-why-blacklivesshouldmatter-and-how-this-impacts-the-anti-trafficking-movement>.

197. See Marian Wright Edelman, *Child Watch Column: “What About the Girls?”*, CHILD. DEF. FUND (Oct. 10, 2014), <http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-documents/Whataboutthegirls.html>.

198. See, e.g., MONIQUE W. MORRIS ET AL., *CONFINED IN CALIFORNIA: WOMEN AND GIRLS OF COLOR IN CUSTODY 12* (2012) (“Courts have often responded to the epidemic by either charging these children with prostitution and confining them or holding them in secure confinement for their own protection, with the explanation that there are no available community-based alternatives.”).

III. LIMINAL CHILDHOOD AND THE FAILURE TO PROTECT AFRICAN AMERICAN CHILDREN FROM COMMERCIAL SEX TRAFFICKING

A recent story in *The Washington Post* demonstrates the particular ways that the liminal status attached to Black girls shapes their treatment by the juvenile justice system. The report highlighted the experience of a Black girl named Tami. According to the story:

A pimp kidnapped Tami on her way home from school in Los Angeles. He held her captive for six months, raping, beating, and starving her. At night, he sold Tami for sex with other men. Tami tried to escape by telling every john who purchased her that she was only a kid. For months, Tami pleaded with her buyers: "I'm only 15. Can you please take me to a police station?" But none did. When she finally encountered police officers, they did not rescue her; they arrested her.¹⁹⁹

Tami's story is emblematic of the ways in which the liminal childhood status experienced by Black girls shapes perceptions of them within the juvenile justice system and leads to racial disparities in the detection, arrest and prosecution of sexually exploited minors.

Although there is no comprehensive estimate of the number of children arrested for prostitution, the Department of Justice has released data collected by thirteen federally funded anti-human trafficking taskforces. According to the Department of Justice, these taskforces identified 2515 suspected incidents of human trafficking, including approximately one thousand suspected cases of child sex trafficking.²⁰⁰ Of the suspected incidents of child sex trafficking, only a quarter of the cases (248) were confirmed as victims of commercial sexual exploitation.²⁰¹ Black girls constituted 40 percent of the confirmed commercially sexually exploited children.²⁰²

Upon examining the data released by the Department of Justice and various local jurisdictions, two things become clear: Black girls are disproportionately represented among juveniles arrested for prostitution, and most of the children arrested for prostitution were not identified as commercially sexually exploited children under the federal definition, despite being under eighteen years of age at

199. Malika Saada Saar, *There Is No Such Thing as a Child Prostitute*, WASH. POST (Feb. 17, 2014), http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html.

200. BANKS & KYCKELHAHN, *supra* note 33, at 3.

201. *Id.* at 6.

202. *Id.*

the time of arrest.²⁰³ This disjuncture is likely produced by the structural dynamics that render Black girls vulnerable to sexual abuse and exploitation; implicit racial biases shape perceptions of Black girls within various institutional settings;²⁰⁴ the discretionary process by which victims of child trafficking are identified and later prosecuted by law enforcement, and the biases that drive the disproportionate incarceration rates for sexually exploited Black girls. As will be discussed below, at each stage of the juvenile justice system—from suspicion and arrest to adjudication and confinement—the stereotypes associated with the liminal status occupied by Black girls affect how they are treated relative to their white counterparts and make them more vulnerable to further criminalization and sexual exploitation.

A. Childhood and Implicit Bias

In a recent study, social psychologist Phil Goff and others found that “Black children enjoy fewer of the basic human protections afforded to their peers because the category ‘children’ is seen to be a less essential category (specifically, less distinct from adults) when it is applied to Black children.”²⁰⁵ The study found that race shapes perceptions of maturity such that “children may not be given the privilege of innocence equally across race.”²⁰⁶ The authors of the study noted the following:

From ages 0–9, children were seen as equally innocent regardless of race. However, perceptions of innocence began to diverge at age 10. At this point, participants began to think of Black children as signifi-

203. AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES (2012) <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf> (noting that most human trafficking suspects are not prosecuted under human trafficking laws); Johnny E. McGaha & Amanda Evans, *Where Are the Victims - The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239 (2009) (noting the variability and unreliability of human trafficking statistics in general and failure of antitrafficking initiatives to lead to actual prosecutions); Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 656-57 (2009) (highlighting the fact that two years after Florida enacted an antitrafficking law and one year after California and Texas enacted antitrafficking laws, neither the Florida nor California law had been used and the Texas law had been used once); Chacón, *supra* note 141, at 3019 (the low level of prosecution for human trafficking and the fact that many human trafficking cases are charged under other laws).

204. Cf. Tina L. Freiburger & Alison S. Burke, *Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision*, 9 YOUTH, VIOLENCE & JUV. JUST. 1, 1 (2011) (finding that Native American boys and Black girls were the populations most likely to be adjudicated).

205. Goff et al., *supra* note 15, at 528.

206. *Id.* at 529.

cantly less innocent than other children at every age group, beginning at the age of 10. Interestingly, after the age of 10, the perceived innocence of Black children is equal to or less than the perceived innocence of non-Black children in the next oldest cohort.²⁰⁷

The findings of this study provide important evidence of the liminal status of African Americans within the broader category of childhood. As noted above, the fact that Black children are perceived as more mature, and thus more accountable for their behavior, may account for racialized and gendered outcomes across a range of social institutions, including social welfare, education, and—perhaps most significantly—within the juvenile justice system.

Indeed, gendered and racial constructs of Black girls as mature and sexually promiscuous shape social biases against them in the discourses and policy debates surrounding issues such as welfare reform. For example, rather than being seen as sympathetic adolescents in need of protection and guidance, Black girls who become pregnant are cast out of the category of child and imbued with adult sexual agency.²⁰⁸ Black girls and women are blamed for social ills such as poverty and violence, and stereotypes of hyperfertility and criminality are used to reduce benefits and implement drug testing in for the push for welfare reform.²⁰⁹ As a result of these biases, welfare programs associated with Black girls have been significantly curtailed and increasingly function in ways that criminalize recipients.²¹⁰ In sum, the liminal status of Black girls, and the stereotypes associated with that status, often animate punitive responses to the issue they disproportionately confront, which range from poverty to sexual trauma.

B. Structural Vulnerability to Sexual Exploitation

Views of Black girls as more mature and less innocent combine with racialized structural inequalities that place them at higher risk of being sexually exploited. For example, a recent study found that Black girls are suspended from school

207. *Id.*

208. See generally ELAINE BELL KAPLAN, NOT OUR KIND OF GIRL: UNRAVELING THE MYTHS OF BLACK TEENAGED MOTHERHOOD (1997) (describing the ways in which stereotypes of Black teenage motherhood and hypersexuality shape social policy).

209. See, e.g., Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 282–83 (1991); Joel F. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 467 (1987–88); Roger J.R. Levesque, *The Role of Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility*, 12 LAW & INEQ. 93, 126 (1993).

210. See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (describing the relationship between race and criminalization of welfare recipients through practices such as drug testing and increased surveillance of poor households).

six times as often as their white counterparts.²¹¹ The authors go on to note that “[t]he available evidence, however, suggests that implicit biases, stereotyping, and other cultural factors may play a role” in creating this reality.²¹² Indeed, in a separate 2007 study, researchers found that Black girls were perceived as “‘loud, defiant, and precocious’ and that teachers were more likely to reprimand black girls for being ‘unlady’-like than were their white or Latina peers.”²¹³ The use of school discipline to police perceived gender nonconformity and the disproportionate rates of suspension also suggest that Black girls do not benefit from assumptions of childhood innocence and immaturity that call for guidance rather than punishment. This separation also increases the likelihood that Black girls may turn to underground economies to support themselves and their families. Being forced out of school may strain social support networks and leave girls more vulnerable to being targeted by pimps.

Moreover, Black women and girls who are victims of sexual trafficking are vulnerable for a number of reasons—including race, gender, class, prior sexual victimization, and placement in the juvenile dependency system. Indeed, poverty is a significant factor in trafficking,²¹⁴ and Black girls disproportionately live in impoverished communities. According to a 2009 study of poverty rates, nearly “one in three Black children lived in poverty.”²¹⁵ Additionally, studies have found that Black girls experience sexual abuse at rates significantly higher than their white counterparts.²¹⁶ Such prior victimization places them at further risk of future sexual exploitation. As one study noted, “[y]outh who experience sexual abuse are twenty-eight times more likely to be arrested for prostitution at some point in their lives than children who [did] not.”²¹⁷ Black girls are also disproportionately represented within the juvenile dependency system,²¹⁸ another risk

211. See CRENSHAW ET AL., *supra* note 17, at 16.

212. *Id.* at 24.

213. MORRIS ET AL., *supra* note 198, at 13.

214. *See id.* at 375.

215. *Id.* at 368.

216. *See, e.g.*, JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 8 (2008); *Domestic Violence Statistics*, ABA, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited June 27, 2015) (“Approximately 40% of Black women report coercive contact of a sexual nature by age 18.”).

217. KATE WALKER, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 18 (2013), http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/Ending-CSEC-A-Call-for-Multi-System_Collaboration-in-CA.pdf.

218. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 93–99, 202–03 (2002) (noting the racial disparities in the juvenile dependency system and interrogating the institutional dynamics that account for such disparities); WALKER, *supra* note 219, at 19.

factor for exploitation. Once placed in a foster home, many Black girls experience further neglect or abuse and run away from their foster homes. When they do so, they join the ranks of runaway and homeless children, who are especially vulnerable to sexual exploitation.²¹⁹ Failure to invest in the communities, families, schools, and other social services indicates a lack of social commitment to the development of Black girls, perhaps, because they are not seen as children who are in need of society's protection.

C. Racial Disparities and Official Discretion in Arrests

Indeed, sexually exploited children, who are disproportionately Black, are often arrested and subject to regulation by the juvenile justice system rather than protection through social welfare institutions. Adjudication through the delinquency system marks Black girls as sexually deviant and stamped by the stigmatizing identity of juvenile delinquent;²²⁰ and the adjudication of a trafficked minor as a delinquent individualizes the systemic factors that led to the sexual exploitation. Instead, Black girls are more likely to be arrested when the trauma they have experienced manifests itself in what is perceived to be antisocial behavior. The various forms of violence they have experienced are erased and an identity as a delinquent is imposed, often leading to subsequent interactions with law enforcement. As one columnist speculated, "when the girls are black, poor and prostituted, there is either indifference or an assumption that they are consenting to the abuse."²²¹ Through adjudication as a delinquent, the stereotypes associated with their liminal status are reinforced, further excluding Black girls from the protections of childhood.

In what advocates have termed the "sexual abuse to prison pipeline,"²²² police are more likely to treat sexually exploited children as offenders and to fail to "ask them about the circumstances of their prostitution."²²³ Children are not seen as victims of sexual abuse notwithstanding the fact that they cannot consent to sex nor are they seen as victims of prior sexual abuse.²²⁴ Rather, drawing upon the stereotypes of sexual maturity and agency that are associated with Black girls, law

219. See WALKER, *supra* note 217, at 20.

220. Godsoe, *supra* note 161, at 1355.

221. Nicholas D. Kristof, *The Pimps' Slaves*, N.Y. TIMES (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/opinion/16kristof.html>.

222. MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY (2015), http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.

223. Godsoe, *supra* note 161, at 1326 (noting that 74 percent of minor arrested for prostitution are incarcerated).

224. SAAR ET AL., *supra* note 222, at 19.

enforcement officials often view girls as complicit in their exploitation. For example, in one instance “a prosecutor argued that a prostituted twelve-year-old merited incarceration because she “lacked remorse [and] . . . need[ed] the structured situation which [would] . . . force [her] to face up to where [she was] in [her] li[fe] and what [she] ha[d] done.”²²⁵ Victims of sexual trafficking are often deemed to be more culpable than the johns that purchase them or the pimps that exploit them as indicated by one New York City study that found that sexually exploited minors were six times more likely than their exploiters to be arrested.²²⁶ As a consequence of the blaming of sexually trafficked girls rather than their exploiters, protective antitrafficking initiatives have gone underenforced.²²⁷

Indeed, the blaming of Black girls for the sexual trauma they experience is highlighted by the story of Danielle Hicks-Best, an eleven-year-old Black girl who reported to the Washington, D.C., police that she had been sexually assaulted. Although her allegation was supported by physical evidence, the police dismissed her claims and instead arrested her for filing a false police report.²²⁸ The police dismissed Hicks-Best’s claim because she was viewed as hypersexual and therefore to blame for her victimization. One investigating officer wrote, “parents are unable to accept the fact that this child’s promiscuous behavior caused this situation.”²²⁹ Clearly, this girl was denied access to the protective construct of childhood, including the notion that children, particularly those as young as eleven, cannot consent to sex. Instead of being protected, this eleven-year-old child was punished, spending “years in and out of detention and secure treatment centers.”²³⁰

Moreover, even when Black girls are identified as victims, they still may not receive the benefits of that status. Although the TVPA states that, “victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked,” victims are often still incarcerated or prosecuted in some manner. In

225. Godsoe, *supra* note 161, at 1364–64.

226. *Id.* at 1338–39.

227. KEVONNE SMALL ET AL., URBAN INST. JUST. POL’Y CTR., AN ANALYSIS OF FEDERALLY PROSECUTED CSEC CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 22 (Feb. 2008), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/222023.pdf> (noting the rates between 1998 and 2005 at which prosecutors declined to move forward with child sexual exploitation cases at the federal level).

228. See Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up With a Conviction*, WASH. POST (Mar. 12, 2015), http://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1eff60ca26de_story.html.

229. *Id.*

230. *Id.*

addition to arrest, Black girls face significant risks of physical violence when interacting with law enforcement agencies investigating prostitution.

The stereotypes of Black girls having adult-like qualities such as hypersexuality and maturity shape police perceptions of them and may increase their vulnerability to police abuse.²³¹ Indeed, in a recent lawsuit, the parents of a twelve-year-old Black girl alleged that she was assaulted by a police officer who suspected her of being a prostitute, despite the fact that she did not match the description of the two white female suspects. According to reports, “the officers thought [the plaintiff] was a hooker due to the ‘tight shorts’ she was wearing.”²³² Three weeks after the incident, “police went to [the plaintiff’s] school, where she was an honor student, and arrested her for assaulting a public servant.”²³³ As this and other cases make clear, liminal childhood status has profound consequences for Black girls, who occupy a borderland of the contradictory approaches to children, sexuality, and criminal law enforcement.

D. Conditions of Confinement

Once arrested, Black girls encounter an increasingly punitive juvenile justice system, where they are often subject to harsh conditions of confinement and encounter difficulty accessing services necessary to address the significant trauma they have experienced. The treatment of Black girls within the juvenile justice system reveals the precarious relationship between their status as children and their race and gender identities. On the one hand, children are viewed as lacking in judgment and maturity and thus are less culpable for criminal offenses; they are viewed as more in need of support and rehabilitation to become productive members of society. On the other hand, children who violate legal norms are treated as possessing adult-like qualities when it comes to their ability to choose to engage in criminality. Indeed, over the last thirty years, “legislatures have moved toward imposing adult-like responsibility on children who commit so-called adult crimes.”²³⁴ The push to impose adult-like responsibility has included extending sentences for juveniles, constructing juvenile facilities to resemble adult

231. See, e.g., Tasha Fierce, *Black Women Are Beaten, Sexually Assaulted and Killed by Police. Why Don't We Talk About It?*, ALTERNET (Feb. 26, 2015), <http://www.alternet.org/activism/black-women-are-beaten-sexually-assaulted-and-killed-police-why-dont-we-talk-about-it>.

232. Chris Vogel, *Police Get the Wrong House in Galveston, Allegedly Assault 12-Year Old Girl*, HOUSTON PRESS (Dec. 17, 2008, 12:37 PM), http://blogs.houstonpress.com/news/2008/12/ngalveston_false_arrest.php.

233. *Id.*

234. Todres, *supra* note 15, at 1134.

prisons, using practices such as solitary confinement in juvenile facilities, trying juveniles as adults, and imposing draconian penalties such as life without parole.²³⁵ Such retributive policies and practices mark the “shifting [of] the boundary of childhood downward.”²³⁶

This rise in punitiveness and the decline in the protections afforded to children have had a devastating effect on Black children. Studies have estimated that approximately sixty-seven thousand juveniles are incarcerated.²³⁷ A study conducted by the Juvenile Justice Information Exchange found that:

[[B]lack youth between the ages of 10 and 17 made up 17 percent of all children in that age group in 2010, but comprised 31 percent of all juvenile arrests, 40 percent of detentions, 34 percent of adjudications (guilty determinations), and 45 percent of all cases transferred to adult criminal court.²³⁸

The pattern of disproportionate representation, for both boys and girls, has been consistent over nearly three decades.

When the juvenile population is disaggregated by gender, studies have estimated that girls represent just over 13 percent of children detained in juvenile facilities each year.²³⁹ The representation of girls in the juvenile justice system, however, has been growing. Between 1991 and 2003, the detention rate for girls increased by 98 percent, compared to a 29 percent increase for boys.²⁴⁰ During this period, girls began to represent an increasing share of the population in the juvenile justice system, largely for noncriminal status offenses such as incorrigibility, running away, or violations of probation, as well as for criminal offenses such as prostitution.²⁴¹

235. See generally NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* (2014) (highlighting the ways in which juvenile detention facilities across the country inflict harm and injury on children, including using solitary confinement); Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After Graham v. Florida*, 81 MISS. L.J. 299, 302 (2011) (noting the practice of juvenile life without parole and arguing “that under the evolving standards of decency analysis, sentencing juveniles to life without parole—for any crime—violates the Eighth Amendment because juveniles are different”).

236. Scott, *supra* note 64, at 571.

237. BERNSTEIN, *supra* note 235, at 7.

238. Lisa Chiu, *After Decades of Spending, Minority Youth Still Overrepresented in System*, JUV. JUST. INFO. EXCHANGE (Feb. 26, 2014), <http://jjie.org/after-decades-of-spending-minority-youth-still-overrepresented-in-system/106398>.

239. BERNSTEIN, *supra* note 235, at 7.

240. Sherman, *supra* note 123, at 1599.

241. *Id.* (“[S]tudies show that 75 percent of runaways are female, and for girls, running away is disproportionately a trigger for system involvement. In 2009, girls made up 55 percent of youth arrested for running away; prostitution was the only other crime for which girls made up the majority of arrests.”).

Indeed, prostitution is one of the few offenses for which arrest rates of girls exceeds arrest rates for boys.²⁴² A study of the metropolitan juvenile delinquency system in New York City found that almost two-thirds of minors fifteen and younger who have been arrested for prostitution were incarcerated.²⁴³

Examining the juvenile population from the intersectional lens of race and gender, the disproportionate representation of Black girls within the system becomes visible. In 2008, Black girls represented 35 percent of all girls referred for adjudication in the juvenile system, despite representing only 8 percent of the ten-to-seventeen-year-old population.²⁴⁴ More than half of the girls in secure detention are Black.²⁴⁵ Indeed, as Meda Chesney-Lind notes, Black girls are “three times as likely as their white counterparts to be held in a secure facility,” despite the fact that white girls represent almost two-thirds of the at-risk juvenile population.²⁴⁶ In California, for example, which contains three cities designated by the FBI as child sex trafficking hot spots, Black girls make up only 3 percent of the juvenile population, yet made up “more than 70 percent of girls held in some northern California detention centers and more than 50 percent of girls receiving institutional commitments” in 2009.²⁴⁷ According to Chesney-Lind, these figures suggest the operation of a “racialized juvenile justice system, where the evidence suggests that white girls who come into the system as status offenders get labeled as child welfare cases while their African American and Latina counterparts are processed as criminals.”²⁴⁸

Once detained in locked juvenile facilities, the Black girls’ liminal childhood status and the racial and gender stereotypes attached to such status shape their treatment within the institution. Indeed, like their adult counterparts, Black girls experience harsh conditions of confinement, including physical and

242. *Id.*

243. AMY MUSLIM, MELISSA LABRIOLA & MICHAEL REMPEL, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 17 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225084.pdf>.

244. Sherman, *supra* note 123, at 1617.

245. See Lisa Kanti Sangoi & Lorie Smith Goshin, *Women and Girls' Experiences Before, During, and After Incarceration: A Narrative of Gender-Based Violence, and an Analysis of the Criminal Justice Laws and Policies That Perpetuate This Narrative*, 20 UCLA WOMEN'S L.J. 137, 147 (2013) (“The use of detention for girls increased by 65% between 1988 and 1997, with Black girls comprising 50% of those in secure detention.”).

246. Meda Chesney-Lind, *Jailing “Bad” Girls: Girls’ Violence and Trends in Female Incarceration*, in FIGHTING FOR GIRLS: NEW PERSPECTIVES ON GENDER AND VIOLENCE 62–63 (Meda Chesney-Lind and Nikki Jones eds. 2010).

247. MORRIS ET AL., *supra* note 198, at 1.

248. Chesney-Lind, *supra* note 246 at 63.

sexual abuse.²⁴⁹ In one particularly egregious example of abuse, a class-action lawsuit against the state of Mississippi alleged that girls in a juvenile detention center were shackled for twelve hours a day.²⁵⁰ In a separate suit brought by the Department of Justice against the same Mississippi juvenile detention center, it was alleged that a girl was “forced to eat [her] own vomit.”²⁵¹

These girls, who are overwhelmingly Black and overwhelmingly victims of sexual and physical abuse, are often subject to physical violence within juvenile institutions, denied access to vital treatment, and treated with profound disregard by staff.²⁵² One study found that Black girls were disproportionately diagnosed with things like oppositional defiance disorder and thus subject to punishment, rather than being diagnosed with post-traumatic stress disorder and thus subject to treatment.²⁵³ In reports lodged against them by detention facility staff, Black girls are often denied both the status of child and victim. One study found that staff described the girls at the facility as “fabricating reports of abuse, acting promiscuously, [and] whining too much.”²⁵⁴ One probation officer reported:

They feel like they’re the victim. They try from, ‘Mom kicked me out’ to ‘Mom’s boyfriend molested me’ to ‘My brother was sexually assaulting me.’ They’ll find all kinds of excuses to justify their actions. Because they feel if I say I was victimized at home, that justifies me being out on the streets.²⁵⁵

The comments above reflect the denial of the girls’ identities as victims and a view of them as possessing adult-like agency in the choices made in response to the physical and sexual trauma they experienced. This form of liminal childhood renders abused Black girls more vulnerable to punitive responses to their behavior in lieu of therapeutic or restorative interventions by the state.

Even when young women are designated as victims of sexual trafficking, they are more likely to be held in locked facilities rather than receive treatment in community-based programs. This is because state and local agencies have not invested sufficient resources in building shelters or homes capable of serving the needs of youths who have been the victims of sexual exploitation.

249. See Holbrook Mohr, *AP: 13K Claims of Abuse in Juvenile Detention Since '04*, USA TODAY, (Mar. 2, 2008, 3:27 PM), http://usatoday30.usatoday.com/news/nation/2008-03-02-juvenile-detention_N.htm (“In 2004, the U.S. Justice Department uncovered 2,821 allegations of sexual abuse by juvenile correction staffers.”).

250. See *id.*

251. *Id.*

252. Chesney-Lind, *supra* note 246, at 64–66.

253. *Id.* at 64.

254. *Id.* at 66 (describing studies).

255. Emily Gaarder et al., *Criers, Liars, and Manipulators: Probation Officers' Views of Girls*, 21 JUST. Q. 547, 557 (2004).

Rather, resources have been directed toward policing, prosecuting and incarcerating traffickers. As the *Washington Post* article noted, “this country has more animal shelters than shelters for exploited children. Judges often detain these girls, believing that jail is the safest of many bad options.”²⁵⁶

IV. SHIFTING THE DISCOURSE AND APPROACH TO ADDRESS THE NEEDS OF COMMERCIALY SEXUALLY EXPLOITED CHILDREN

Black girls are born into a society that denies them access to central tenets of childhood, particularly during the period of adolescence. This dynamic is a product of America’s history of gendered racial subordination, which began in the context of slavery and extends into the contemporary era. The liminal status associated with Black girls in turn shapes social policy regarding children in ways that disadvantage them, including initiatives targeting “modern slavery” and responses to prostitution within the juvenile justice system. In every ostensibly protective space—from home to school to their communities—Black girls who experience sexual abuse or exploitation are underprotected and marginalized. Interventions to prevent their exploitation are often non-existent and criminalization an ever-present threat. At every stage of the juvenile justice system—from detection to arrest to adjudication—Black girls are disproportionately represented as compared to their white counterparts.

Nowhere were these trends more apparent than the Los Angeles juvenile hall where I heard from so many Black girls who experienced sexual abuse and exploitation. The faces of those girls, however, represented more than the statistical and structural realities that disadvantage Black girls. Rather, the girls spoke powerfully to the psychological toll of their exploitation and criminalization as they described the blame they felt, the stigma placed upon them by the juvenile justice system, and their isolation from supportive services. Regardless of the intent of law enforcement in placing the girls in the locked facility, the harm and the trauma the girls internalized as a result of their adjudication and detention was palpable and fraught with the potential for negative outcomes that could affect the rest of their lives.

Indeed, as a result of their liminal childhood status, Black girls like those at the detention center are largely excluded from the class of victims protected by child anti-trafficking policies. Rather, they are more likely to be punished for prostitution or other related offenses such as loitering, curfew violations, or running away from home. Their liminal status is reinforced by policies that allows

256. Saar, *supra* note 198.

for criminalization of minors—often under the guise of protection—and a failure to invest in the social services necessary to support girls who are sexually exploited or who are at risk of sexual exploitation. Their vulnerabilities are compounded as a result of their adjudication as delinquents within the juvenile justice system. As a result of their incarceration, they are further separated from institutions such as schools, experience diminished prospects for employment, and continue to suffer the effects of their traumatic experiences. The experience of Black girls demonstrates that federal, state, and local governments cannot simply criminalize their way out of a complex social problem that has deep roots in racial, gender, and economic vulnerabilities. As legal scholar Francine Sherman notes, “[u]nderstanding the brutal nature of commercial sexual exploitation and the need to protect victimized youth, policymakers must still be mindful of the way the impulse to protect teenage girls has historically driven them into the justice system.”²⁵⁷

Instead, governmental action to address the commercial sexual exploitation of children must address the broader ecology of structural inequality and the corresponding breakdown of the social safety net in marginalized communities. In order to disrupt the marginal status occupied by Black girls and the sexual exploitation they disproportionately experience, lawmakers and advocates at the federal and state levels must address their specific vulnerabilities. Of course, a shift in federal and state policy regarding sexually exploited minors will not undo centuries of racialized and gendered exclusion from childhood, but it can ensure that the exclusion that Black girls experience is not exacerbated or reinforced. In other words, a race- and gender-conscious shift in antitrafficking policy can contest the stereotypes that are often associated with Black girlhood.

A. Federal Reform

Since 2000, the federal government has adopted a definition of “severely trafficked persons” that treats anyone under the age of eighteen who engages in a commercial sexual act as a victim of human trafficking. Under federal policy, victims of human trafficking should not be inappropriately incarcerated or “be detained in facilities inappropriate to their status as crime victims.”²⁵⁸ Yet, enforcement has been uneven. Only a few hundred confirmed victims of “severe human trafficking” have been identified under the federal definition. Commercially sexually exploited children continue to be subject to detention and arrest,

257. Sherman, *supra* note 123, at 1611.

258. 22 U.S.C. § 7105(c)(1)(A) (2012).

particularly at the state level. Advocates have argued that federal funding to combat the sexual exploitation of children has been inadequate to meet the existing need.

To address these deficiencies, Congress recently enacted legislation that will push states in this direction. Under the Justice for Victims Trafficking Act of 2015, the federal government established grant programs to support the implementation or expansion of child sex trafficking deterrence programs at the state and local levels, increase coordination between social services and law enforcement to better serve victims, provide services to sexually trafficked children and to establish programs to find homeless and missing children.²⁵⁹ The Act also establishes a council of survivors of child sex trafficking to advise and federal policies on the trafficking of children.²⁶⁰ Most significantly, the Justice for Victims of Trafficking Act provides funding preferences and incentives for states to adopt safe harbor statutes.²⁶¹

While these are significant steps, the federal priorities embodied by the Justice for Trafficking Victim's Act do not address the structural factors that lead to exploitation in the first place or the specific intersectional dynamics that lead to disparate outcomes for Black girls. In order to prevent the sexual exploitation of children, the federal government must support the development of programs that address the structural vulnerabilities of children including racial inequality, poverty, homelessness, educational inequity, inadequate foster care and high rates of sexual abuse. Moreover, whether or not a major shift in the treatment of sexually exploited minors will occur is dependent on state and local government.

B. State Reform

States, as the primary site for the intervention for the sexual exploitation of children, should focus on at-risk populations rather than waiting for girls to be subject to sexual exploitation. Such an approach would require the investment of resources into the communities and homes in which Black girls reside; it would require investments into the lives and health of Black girls. For example, homelessness or housing instability is a significant risk factor for sex-

259. Justice for Victims of Human Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 231-36 (2015)(to be codified at 42 U.S.C. 14044b).

260. Survivors of Human Trafficking Empowerment Act, Pub. L. No. 114-22, § 115, 129 Stat. 242-44 (2015).

261. Justice for Victims of Human Trafficking Act of 2015, § 601, 129 Stat. at 258-59 (to be codified at 42 U.S.C. § 3796dd).

ually exploited children. Yet, advocates and scholars continue to find inadequate emergency and foster care homes for children who are escaping abusive environments. Those children, in turn, wind up on the streets where they engage in survival sex or are prostituted by pimps. Similarly, sexual abuse is a significant risk factor for child sex trafficking that is often overlooked in settings such as schools. State and local jurisdictions should provide training and establish protocols within child-serving institutions such as schools on how to better recognize the signs of sexual abuse and institute trauma-informed services instead of suspension or expulsion when children act out as a result of abuse.

States should also provide training and support to law enforcement officials who are often the first to detect sexually exploited children. The decisions that law enforcement officials—whether a police officer or prosecutor—make at the detection stage are critical. Law enforcement officials can use their discretion to determine whether to detain or arrest a child for juvenile prostitution, whether to adjudicate or divert a child out of the system and they can determine placements. As noted above, these discretionary decisions are often shaped by racial and gendered biases that draw upon the stereotypes associated with their liminal status and functions to disproportionately designate Black girls as offenders rather than victims. To combat these and other biases, states should institute implicit bias trainings and mandate the collection of arrest, prosecution and disposition data on juvenile prostitution disaggregated by race and gender.

In many ways, the shift toward a structural approach to the vulnerabilities of trafficked children demands a shift away from a punitive approach to juvenile delinquency. Policymakers and advocates at the state level must eliminate discretionary victim designations that often exclude Black girls by mandating that anyone under the age of eighteen who engages in commercial sex be deemed a victim as a matter of law and require diversion out of the juvenile or criminal justice systems. This robust form of safe harbor should be applicable without regard to prior arrests or cooperation with law enforcement. Such a mandatory designation would limit the risk of bias against Black girls and could challenge contemporary perceptions that situate them at the margins of childhood. The decriminalization of juvenile prostitution would enable children to be directed out of the delinquency system and into social services that can address the root issues that led to their victimization, including psychological treatment to address trauma, housing, education, and programs designed to promote familial support of our antitrafficking efforts.

CONCLUSION

The lives of poor Black girls are profoundly shaped by exclusion and violence. Black girls exist at an intersection of race, class, and gender and are situated in a liminal space both inside and outside of the category of child. They exist at an intersection of race, class, and gender that renders them vulnerable to public and private forms of violence, including commercial sexual exploitation. Yet the institutions that are ostensibly designed to protect them fail to recognize the ways in which their race, gender, and class identities shape their experiences with sexual violence and criminalization.

In order to fully combat the commercial sexual exploitation of children, policymakers, advocates, and academics must center the concerns of Black girls and attend to their particular vulnerabilities. This approach calls for the deconstruction of the social, political, and economic institutions that marginalize Black girls and exclude them from protection. In order to address the structural vulnerabilities of Black girls, we must recognize the ways in which criminal punishment has not protected girls but instead has operated to further subordinate and entrench their liminal status, both historically and contemporarily. In sum, we must bring vulnerable Black girls from the margins to the center.