



Black Girls and the (Im)Possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States

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ABSTRACT

The Trafficking Victims Protection Act (TVPA) considers all youth less than eighteen years of age trafficking victims without a showing of force, fraud, or coercion. The presumption is that minors cannot legally consent to sex and thus are always victims. Being characterized as a victim helps youth access support services and avoid prosecution in certain circumstances. However, local and state governments struggle to provide all youth with comprehensive resources. Additionally, legal and advocacy interventions fail to substantively engage racialized vulnerabilities that serve as pathways into the sex trade and the juvenile justice system.

Black girls are disproportionately prosecuted for prostitution offenses yet their narratives are seldom heard. Controlling images of Black womanhood, as unvirtuous, immoral, and blameworthy, impact interactions between Black girls and the juvenile justice system, as well as, service providers. By overlooking race, the TVPA and antitrafficking advocates do not anticipate and remedy the complexity of applying a victim standard to Black girls and other marginalized youth.

Consequently, the TVPA and antitrafficking discourse fail to respond to the economic forces driving sexual exploitation and sexual exchange. Rather, interventions to address the Commercial Sexual Exploitation of Children (CSEC) have put forth a limited narrative—magnifying sensationalized depictions of violence and force—and focus primarily on strengthening law enforcement apparatuses, which reinforce racial profiling and oversurveillance in low-income communities of color.

Therefore, this Comment challenges the use of victim rhetoric in antitrafficking interventions and confronts the absence of racial discourse when devising next-steps. Centering the unique experiences of Black girls reveal the limitations of current narratives and strategies deployed in antitrafficking policies, which include failing to create nonjudgmental services and viable alternatives to sex work for youth.

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INTRODUCTION

The Trafficking Victims Protection Act (TVPA),¹ which is the seminal legislation in the United States countering human trafficking, developed simultaneously with international efforts to address what has been termed “modern day slavery.”² Human trafficking is a global enterprise estimated to generate upwards of 150 billion dollars annually³ and triggers concerns about migrants’ human rights.⁴ Legislative interventions to combat the issue include enhancing penalties against traffickers, allocating funding to assist local, state, and federal governments in the prosecution of trafficking cases, and providing protection and support services to trafficking survivors.⁵ However, these interventions have been put forth with certain victims in mind—women and children who are forced into the sex trade by exploiters.⁶ Advocates debate the prevalence of sex trafficking when compared to other forms of labor exploitation⁷ and whether an abolitionist or nonabolitionist approach to adult prostitution should frame how the “victim” label is ascribed and how interventions are developed and implemented.⁸

1. Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2000).
2. Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U PENN. L. REV. 1655, 1657 (2010) (stating that in 2000, when the TVPA was passed, “the United States led negotiations over a new international law on trafficking, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children . . .”). For an analysis of the analogy to the Trans-Atlantic slave trade, see Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 208 B.U. INT’L L.J. 207.
3. Estimates vary as to the amount of revenue generated from human trafficking. But according to the International Labour Organization, \$150 billion dollars is the estimate they go by. *ILO Says Forced Labour Generates Annual Profits of US \$ 150 Billion*, INT’L LAB. ORG. (May 20, 2014), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/; *Human Trafficking*, OFFICE ATT’Y GEN., CAL. DEP’T JUST., <http://oag.ca.gov/human-trafficking> (last visited July 31, 2015). Some scholars challenge the estimates made by organizations and antitrafficking advocates as unsubstantiated “guesswork.” See Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337, 1356 (2012), <http://scholarlycommons.law.northwestern.edu/jclc/vol101/iss4/4>.
4. Chuang, *supra* note 2, at 1662 (asserting that “trafficking [i]s a phenomenon deeply rooted in migrant abuse and labor exploitation”).
5. See generally Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2000).
6. See Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism”*, 18 DIFFERENCES 128, 130 (2007) (“[T]he forced prostitution of women and girls constitutes the paradigmatic instance of what ‘modern-day slavery’ is assumed to be.”).
7. Chuang, *supra* note 2, at 1657 (“Although trafficking into non-sex sectors arguably accounts for the larger proportion of trafficking activity, anti-trafficking laws and policies—both within the United States and abroad—have nonetheless remained focused on sex-sector trafficking and prostitution.”).
8. *Id.* at 1656 (stating that what constitutes “trafficking” is “hotly contested”).

Nevertheless, one thing advocates on both sides of the aisle seem to unequivocally agree upon is that minors are victims by virtue of their inability to legally consent to sex.⁹ The debates, however, presume that all minors are afforded “victim” status where their morality and lack of agency are uncontested, and that implementing support services is a non-issue. This couldn’t be further from the truth.¹⁰ Not only is victimhood racially coded, but the debates surrounding consent in the adult prostitution context spill over in the juvenile realm. The focus of this Comment is antitrafficking discourse in the United States and the racial implications of the prevailing antitrafficking frame.

In the United States, Black youth¹¹ account for approximately 62 percent of minors arrested for prostitution offenses¹² even though Blacks only make up 13.2 percent of the U.S. population.¹³ The TVPA, which initially focused more on the trafficking of children and women internationally,¹⁴ asserts that all persons under the age of eighteen are victims of trafficking or commercial sexual exploitation (CSEC) without having to prove force, fraud, or coercion.¹⁵ It appears that for Black girls, however, the label of “victim” is not only rebuttable, but is also never presumed to begin with.¹⁶ Black girls consequently occupy a contested

9. *Id.* at 1662; Weitzer, *supra* note 3, at 1337.

10. See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 116–17 (“unchanged state laws still consider prostituted minors as delinquent kids . . .”).

11. The cited statistic does not disaggregate by gender, race, and age simultaneously. Throughout this Comment, however, when I refer to Black girls, I am not only referencing the experiences of cisgendered, heterosexual Black girls, but also those gender-nonconforming, queer, and transgendered Black girls.

12. *Table 43: Arrests by Race, 2013*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2013/crime-in-the-u.s.-2013/tables/table-43> (last visited June 14, 2015).

13. Population may be slightly higher given mixed raced populations. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 8, 2015).

14. The TVPA’s funding, programs, and services were initially focused on victims with immigration needs via the allocation of visas and refugee services. 22 U.S.C. §§ 7101–7112 (2012). For background information on the Trafficking Victims Protection Act, see Adelson, *supra* note 10. See also Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 914–15 (2006). The initial lack of attention to American minors is grossly disproportionate given that only about 10 percent of CSEC in the United States is connected to international networks. See Francine T. Sherman & Lisa Goldblatt Grace, *The System Response to the Commercial Sexual Exploitation of Girls*, in *JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE* 331, 340 (Francine T. Sherman & Francine H. Jacobs eds., 2011); Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 165 (2013) (“The United States is the only modern democratic country where the majority of trafficking victims are its own citizens.”).

15. Trafficking Victims Protection Act, § 103(8)(A), H.R. 3244, 106th Cong. (2000).

16. Kali Holloway, *When You’re a Black Woman, You’re Never Good Enough to Be a Victim*, JEZEBEL (Sep. 11, 2014, 2:40 PM), <http://jezebel.com/when-youre-a-black-woman-youre-never-good-enough-to-be-1633065554>; Noliwe M. Rooks, *Renisha McBride and Evolution of Black-Female Stereotype*, TIME (Nov. 14, 2013), <http://ideas.time.com/2013/11/14/renisha-mcbride-and-black-female-stereotype>; Kali Nicole Gross, *Silence on Black Female Victims Weakens Fight Against Police Brutality*, HUFF-

“victim” position, regardless of whether they have been exploited by a trafficker or engaged in survival sex. The overrepresentation of Black girls in criminal systems for prostitution offenses exposes their vulnerability to involvement in the sex trade.¹⁷ The criminalization of Black girls as offenders reflects the historical rendering of Black girls and women as non-victim and therefore foreclosed in their receipt of comprehensive support.

Racial stereotypes and the high rates of survival sex complicate the application of the TVPA, which again asserts that anyone under the age of eighteen is a victim. Advocates struggle to negotiate effective strategies that provide protection and services to youth. The antiprostitution stance of antitrafficking discourse as evidenced by “rescue” initiatives is stigmatizing to minors that do not identify with the prevailing frame. Hence, the dominant framework fails to account for nuanced narratives and various pathways into the sex trade for minors.

Consequently, because antitrafficking discourse puts forth the victim-exploiter dyad as the prevailing framework, it fails to account for the fact that a majority of youth are engaging in sex work independently and recruited through peer networks.¹⁸ The hegemonic narrative leans on the desire to ascribe blame to a “trafficker” or “exploiter” without empirical evidence supporting highly punitive policies.¹⁹ Similar to advocacy against domestic violence, antitrafficking legal interventions focus on developing punitive responses against pimps and buyers and funding law enforcement taskforces and trainings.²⁰ Instead of adopting strategies to increase social support and the development of community-based re-

INGTON POST (Apr. 19, 2014, 6:21 PM), http://www.huffingtonpost.com/kali-nicole/gross/silence-on-black-female-victims_b_7092128.html.

17. Vulnerabilities to sex work and exploitation include disproportionate poverty and involvement in the child welfare system. CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 3 (Jan. 2011), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf; *Poverty in the United States: Frequently Asked Questions*, NAT'L POVERTY CTR., <http://www.npc.umich.edu/poverty/> (last visited July 31, 2015); *Child Poverty Down – Income of Families With Children Up*, U.S. CENSUS BUREAU: BLOG (Sep. 16, 2014), <http://blogs.census.gov/2014/09/16/child-poverty-down-income-of-families-with-children-up/> (stating that the child poverty rate of Black children is between 35 and 45 percent and has experienced no decrease between 2012 and 2013 unlike other racial groups); JON C. ROGOWSKI & CATHY COHEN, DEMOCRACY REMIXED: BLACK YOUTH AND THE FUTURE OF AMERICAN POLITICS 3–4, <http://www.blackyouthproject.com/files/2014/08/ferguson.pdf>.
18. *See generally* MEREDITH DANK ET AL., URBAN INSTITUTE, SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX (2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000119-Surviving-the-Streets-of-New-York.pdf>.
19. *See generally* Weitzer, *supra* note 3.
20. *Operation Cross Country*, FBI (June 23, 2014), <https://www.fbi.gov/news/stories/2014/june/operation-cross-country>; FBI, INNOCENCE LOST NATIONAL INITIATIVE, <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/AWOLP/FBI-Presentation.pdf>.

sponses in low-income communities, antitrafficking advocates place overwhelming emphasis on developing stronger methods of gathering evidence, capturing traffickers, and lengthening prison terms.²¹ Relying primarily on punitive criminal justice interventions does not comprehensively address the needs of youth involved in the sex trade nor does it make communities of color safer.²² Punitive policies produce disparate outcomes for low-income communities, particularly Black communities, where Black men are disproportionately policed and prosecuted as exploiters.²³

Because youth trigger a greater societal responsibility in terms of providing support, advocates must recognize the complexities of youth narratives and how race informs conceptions of victimhood. Without doing so, the assumption is that the needs of all youth are being met by deploying victim rhetoric. Centering Black girls in conversations about CSEC, poverty, survival, and support is a vital next step for persons advocating on behalf of minors engaged in the sex trade.²⁴

Part I of this Comment introduces the victim paradigm as asserted by antitrafficking advocates, the criminal policy developed to respond to sex trafficking, and the debates between advocates over consent and morality. Part II critiques the failure of antitrafficking advocates to make space for complex narra-

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21. *Ridley-Thomas, Knabe Call for Stronger Penalties for Adults Soliciting from Children*, CNTY. L.A. (Sep. 2, 2013), <http://ridley-thomas.lacounty.gov/index.php/penalties-2/>; SHARED HOPE INT'L, INNOCENCE LOST CHALLENGE: 2014 NATIONAL LEGISLATIVE PROGRESS REPORT, <http://sharedhope.org/wp-content/uploads/2014/06/2014-Mid-Year-Progress-Report.pdf>.
 22. *Police Violence & Domestic Violence*, INCITE!, http://www.incite-national.org/sites/default/files/incite_files/resource_docs/2883_toolkitrev-domesticviolence.pdf (last visited July 31, 2015); *Fact Sheet on Domestic Violence and the Criminalization of Survival*, FREE MARISSA NOW, <http://www.freemariissanow.org/fact-sheet-on-domestic-violence-criminalization.html> (last visited July 31, 2015); A.B.A. COMM'N DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (Nov. 2007), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf; Radha Iyengar, *The Protection Battered Spouses Don't Need*, N.Y. TIMES (Aug. 7, 2007), <http://www.nytimes.com/2007/08/07/opinion/07iyengar.html>; David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. CRIM. L. & CRIMINOLOGY 255 (2007), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=jclc>.
 23. WILLIAM ADAMS ET AL., U.S. DEP'T JUST., EFFECTS OF FEDERAL LEGISLATION ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 7 (2010), <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf>.
 24. Throughout this Comment, I use terms and phrases such as "exploited," "victim," and "youth engaged in sexual exchange." The goal is not to further stigmatize youth. Rather, the terminology used is a reflection of the difficulty in categorizing youth without assuming their stories and obscuring self-identification. Thus, these terms are used interchangeably in order to highlight differences in identification and categorization, given this Comment's interrogation of these labels and the intricacies inherent within them. Further, the term "survivor" is not used in the place of "victim" because this Comment is focused on the experiences and resources available to youth while involved in sexual exchange.

tives of youth involved in the sex trade. This Part focuses on the stereotyping of Black girls within justice systems, as well as, their hypervulnerability to incarceration for prostitution offenses. Part II also argues that antitrafficking criminal policies reinforce racial profiling in Black communities. Finally, Part III concludes by reaffirming the necessity of elevating the narratives and needs of Black girls in order to create and implement comprehensive solutions to a structural problem.

I. DOMINANT FRAME

In order to contextualize critiques presented in Part II, this section aims to provide a landscape of the dominant antitrafficking discourse and its contested issues. The way the problem is framed and the solutions proposed thereafter are political decisions designed to invoke a call to action. Therefore, this Part focuses specifically on the victim rhetoric deployed by antitrafficking advocates, those involved in programming to counter supply, and legislators whose criminal policies are aimed at countering demand.

A. Framing the Problem: The Horrors of CSEC

Human trafficking is a lucrative enterprise, estimated to be a global \$150 billion dollar industry annually.²⁵ Although labor trafficking is considered the most prevalent form of human trafficking, the sexual exploitation of women and children is given substantially more attention.²⁶

In raising awareness about CSEC in the United States, advocates have highlighted narratives of violence, abuse, and force. Studies have shown that a majority of exploited girls have histories of sexual, physical, and substance abuse. In the report titled, “The System Response to the Commercial Sexual Exploitation of Girls,” the authors state that “[c]hildren who were sexually abused are 28 times more likely to be arrested for prostitution at some point in their lives than children who were not sexually abused.”²⁷ Youth vulnerable to sexual exploitation are also more likely to have witnessed substance abuse by a caregiver or domestic violence in the home, leading to diminished educational outcomes and self-esteem.²⁸ To flee trauma, many girls run away from home, which becomes a pathway to prostitution, criminalization, and instability.²⁹

25. See *supra* note 4 and accompanying text.

26. Chuang, *supra* note 2, at 1696.

27. Sherman & Grace, *supra* note 14, at 336.

28. See *id.* at 337.

29. *Id.* (“[T]he majority of prostituted women were runaways as children . . .”). See also Pantea Javidan, Comment, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237, 252 (2003) (“Prostitution is one means of survival

Exploited youth have high rates of suicide and depression, sexual health issues, drug and alcohol abuse, long-term health problems, and delayed progress in school.³⁰ Studies also report high rates of “dissociative disorders, self-destructive behaviors (including cutting), suicide attempts, and clinical depression” as well as posttraumatic stress disorder (PTSD) and Stockholm Syndrome.³¹

In addition to emotional and physical harm, exploited girls have limited access to consistent medical care and reproductive health care.³² Many exploited youth die within seven years of first being exploited because of their vulnerability to murder and HIV/AIDS.³³ Research also indicates that exiting the sex trade is extremely difficult for youth with recidivism rates indicating that it can take as many as twenty relapses before an exploited child is free from her exploiter.³⁴ Further, it is estimated that about eighty percent of women involved in sex work began before the age of eighteen.³⁵

Girls with troubled homes are also often placed in the child welfare system. One study estimated that between fifty and eighty percent of exploited youth have had contact with the child welfare system.³⁶ Once engaged in sexual exchange, the trauma and violence is reproduced and seldom reported due to the fear of retaliation or prosecution, while others fear returning to child protective services.³⁷

Girls are funneled into the juvenile justice system for prostitution offenses. Many are typically categorized as low risk and high need—meaning they do not pose a threat to law enforcement or the broader community and require a sub-

in which many runaways engage in at one point in time or another. The more they participate, the more likely it is that they rely upon selling themselves for income. Where prostitution is criminalized, a child prostitute’s survival within the street economy is necessarily grounded in criminal acts. Juvenile prostitutes will most likely be arrested and incarcerated in the juvenile justice system as detainees who often serve time through adulthood, with strong indicators that their children will end up doing the same.”). *Id.* at 249. (“There is little recourse for juveniles in the street economy. They cannot return to abusive homes, [nor] find legitimate work [nor] stable housing.”).

30. *See generally* Sherman & Grace, *supra* note 14.

31. *See id.*

32. *Id.* (“[Exploited] girls are seen most frequently in emergency rooms and clinics where providers are likely not to have an ongoing relationship with them.”).

33. *See* KATE WALKER, CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN iii (2013), http://youthlaw.org/wp-content/uploads/2015/01/Ending-CSEC-A-Call-for-Multi-System_Collaboration-in-CA.pdf.

34. *Id.* at 16.

35. *Id.*

36. *Id.* at iii.

37. ANTHONY MARCUS ET AL., CONFLICT AND AGENCY AMONG SEX WORKERS AND PIMPS: A CLOSER LOOK AT DOMESTIC MINOR SEX TRAFFICKING 242 (2014).

stantial amount of social services.³⁸ In spite of these needs, the juvenile justice system is designed to respond to more violent and problematic behavior associated with males.³⁹ Given the smaller demographic of girls in the juvenile justice system, gender-responsive approaches are subject to budgetary constraints and are thereby limited.⁴⁰ But it's precisely the lack of gender-responsive support services as well as the inappropriateness of the penal environment given the nature of their crimes that can be retraumatizing for CSE victims.⁴¹ To address these risks, advocates call for a "continuity of care and the provision of long-term services and supports," such as housing placements, trainings for service providers, and data collection.⁴²

Youth come into the child welfare and juvenile justice systems with preexisting trauma, making them particularly vulnerable to exploiters who target girls with these backgrounds.⁴³ Thus, given that exploited youth are often involved in the child welfare system and juvenile justice system at high rates, advocates have argued that both systems are in a unique position to establish prevention and intervention services.⁴⁴

The findings detailed above paint a particular narrative—one that triggers sympathy and deep concern. However, some researchers have refuted studies that reveal a monolithic narrative. One scholar noted that the trafficking narrative is reductive and evokes images of innocent women and children forced into the sex industry by evil, deviant men.⁴⁵ The hyperfocus on exploiter involvement is also problematized by scholars and will be discussed further in Part II(c). Understanding the vulnerabilities of youth engaged in sex work is very important, however, images of victimization often promote myopic interventions. The next Subpart highlights how the horrors associated with CSEC presented by anti-trafficking advocates not only frame the problem but also frame solutions.

38. Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1621 (2012).

39. *See id.* at 1614.

40. *See* LIZ WATSON & PETER EDELMAN, GEORGETOWN CTR. ON POVERTY, INEQUALITY AND PUB. POLICY, IMPROVING THE JUVENILE JUSTICE SYSTEM FOR GIRLS: LESSONS FROM THE STATES 5 (2012).

41. *See id.* at 3.

42. WALKER, *supra* note 33, at 2; *see* Sherman & Grace, *supra* note 14, at 345–46.

43. *See* WALKER, *supra* note 33, at 11.

44. *See id.* at 4.

45. Chuang, *supra* note 2, at 1698.

B. Addressing Supply: Antiprostitutionism and “Rescue”

The solutions antitrafficking advocates develop are premised upon the victim status of exploited minors. In developing narratives about social problems, such as crime and violence, victims are central characters.⁴⁶ The perception of victims operates on a spectrum of innocence and responsibility, and victims are mapped onto this spectrum based on who is deemed most worthy of sympathy and action.⁴⁷ In order to garner public attention and concern about an issue, advocates “use victimization as a way to show others that people are worthy of help.”⁴⁸ The victim label has been used as a powerful means of guiding public reactions to individuals and social problems.⁴⁹ As a result, the purpose of the victim designation is to deflect responsibility, name the source of harm, and identify appropriate responses and remedies.⁵⁰ Antitrafficking advocates have been successful in asserting that minors are victims through media and leaning on laws that treat minors as less culpable than adults. Exploiter impunity becomes the blameworthy culprit; therefore, stronger punitive interventions are advocated for.

The dominant antitrafficking discourse in the U.S. follows an antiprostitution framework—meaning that prostitution is seen as inherently coercive.⁵¹ Some advocates have discredited this approach. These advocates point to dominant antitrafficking discourse as a “moral crusade,” one that promotes the “rescue and restore” model advanced by evangelical Christians, law enforcement, and antiprostitution feminists alike.⁵² Even though advocates dispute adult consent to sex work, advocates tend to not contest the inability of youth to legally consent to sex.⁵³

46. NANCY BERN, FRAMING THE VICTIM: DOMESTIC VIOLENCE, MEDIA, AND SOCIAL PROBLEMS 151 (2004).

47. *See id.*

48. *Id.* at 152.

49. *Id.*

50. *See id.* at 153.

51. The stance that prostitution is inherently coercive became the approach to trafficking and prostitution in the United States. See National Security Presidential Directive 2–3 (Dec. 16, 2002), <http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf>; Bernstein, *supra* note 6, at 130 (“[F]ederal- and state-level antitrafficking laws that equate all prostitution with the crime of human trafficking and that rhetorically capture both of these activities under the rubric of modern slavery.”).

52. Bernstein, *supra* note 6, at 139.

53. *See generally* Weitzer, *supra* note 3, at 1337 (“Trafficking that involves underage persons or adults subjected to force, fraud, or coercion is a serious violation of human rights, and the growing international awareness of the problem and efforts to punish perpetrators and assist victims are welcome developments.”).

Thus, victim status is critical to the antitrafficking platform and has been incorporated into federal responses to the issue.⁵⁴ The TVPA was first introduced in 2000 and has been reauthorized in 2003, 2005, 2008, and 2013, resulting in the expansion of its remedial efforts. The Act has three primary components: protection, prosecution, and prevention. For individuals under the age of eighteen, the TVPA states that jurisdictions “should treat minor victims of sex trafficking as crime victims rather than as criminal defendants or juvenile delinquents.”⁵⁵ The TVPA suggests that states adopt laws presuming minors are victims of sex trafficking and avoid labeling those minors as criminals.⁵⁶ Even though the federal government has labeled minors as victims, they are often subjected to prosecution for prostitution in state courts as criminal defendants or juvenile delinquents.⁵⁷ In light of the TVPA, minors should not be adjudicated in the juvenile justice system as criminals.

To reassert the status of minors as victims, antitrafficking advocates rely upon the different treatment of and greater protection given to youth in the criminal system. For instance, the juvenile justice system was developed to rehabilitate youth in recognition that children are different from adults and therefore require a system “explicitly structured to provide individualized, contextualized, case-by-case assessments.”⁵⁸ *Parens patriae* is a concept that allows for the state to act as the parent of the child, displacing biological parental authority.⁵⁹ Thus, the state is supposed to take responsibility for youth rehabilitation and, presumably, the positive reintegration of youth into society postadjudication.

The U.S. Supreme Court has reinforced differences between youth and adults in several cases because juveniles (a) lack maturity and a sense of responsibility, (b) are vulnerable to external influence, and (c) have personality and character elements

54. See Mir, *supra* note 14, at 164.

55. See Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. § 221(a)(3)(A) (2013).

56. See *id.* §§ 221(a)(3)(A), (B)(i)–(ii) (2013) (showing strengthened protocols for collaboration between federal, state and local law enforcement for more effective prosecution of traffickers); Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (establishing new systems to gather data, enhanced criminal sanctions against traffickers, and improved prosecution mechanisms); Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (2006) (establishing a shelter program for minors and grants for state and local law enforcement); Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (2003) (establishing federal right to sue traffickers and the annual requirement of the Attorney General to report U.S. activities fighting against trafficking); Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2000) (establishing human trafficking and other related crimes as federal crimes with severe penalties, mandates restitution, established a monitoring body to publish the Trafficking in Persons report annually).

57. See WALKER, *supra* note 33, at 46.

58. Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1505 (2012).

59. See Sherman, *supra* note 38, at 1590.

that are not yet fully formed.⁶⁰ These rationales are engrained in state statutes criminalizing statutory rape. Statutory rape, the consensual sexual relationship between a minor and an adult, is punishable in most states because minors are not considered to be sexually emancipated and therefore cannot legally consent to a sexual relationship with someone of majority age.⁶¹ Statutory rape laws do not hold the underage person responsible for the sexual encounter.

Even though advocates lean on youth/adult distinctions in criminal law, state law has historically failed to distinguish between child and adult prostitution.⁶² States have taken three different approaches to youth prostitution: (1) not arresting or convicting youth for prostitution; (2) creating diversion programs so that victims can receive services; or (3) charging youth with prostitution and placing them in the juvenile justice system.⁶³

Safe harbor laws and immunity statutes are often suggested as ways to decrease the criminalization of minors involved in sexual exchange and address inconsistencies in how juvenile consent is reflected in state laws.⁶⁴ Safe harbor laws protect and assist exploited minors by providing support services and preventing criminal prosecution for prostitution.⁶⁵ Safe harbor laws, however, vary state-by-state and are limited in their scope. Many have various eligibility requirements

60. *Roper v. Simmons*, 543 U.S. 551, 559–70 (2005) (holding that sentencing juvenile offenders to death is unconstitutional because the death penalty should only be available for the most serious crimes and the most culpable offenders); *Graham v. Florida*, 560 U.S. 48, 68–82 (2010) (holding that sentencing juvenile offenders to life without the possibility of parole for nonviolent offenses is unconstitutional because even though youth can be held responsible for crimes they commit, they are not as morally reprehensible as adults); *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (holding that “requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes . . . violate[s the Constitution]”).

61. See *In re T.A.J.*, 73 Cal. Rptr. 2d 331, 338 (1998).

62. Adelson, *supra* note 10, at 96 (“[M]ost jurisdictions’ prostitution statutes fail to distinguish between adult and child prostitutes.”); see also Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1068 (2011) (“[T]he vast majority of states define the offense of prostitution without regard to the defendant’s age”); Sherman & Grace, *supra* note 14, at 333 (stating that New York has no age requirement and that “[n]onetheless, the vast majority of state prostitution laws allow the prosecution for prostitution of those very minors who, by virtue of their age, are considered incapable of consenting to sexual activity under state statutory rape laws”).

63. See INST. OF MED. & NAT’L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 25–26 (Rona Briere & Patti Simon eds., 2013) (recognizing that there is an “absence of a shared language regarding commercial sexual exploitation and sex trafficking of minors”).

64. POLARIS, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR (2014), http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/2014/2014_Safe_Harbor_Issue_Brief_Final_1.pdf.

65. *Id.*

such as the exploited minor's age, prior offenses, and offense type.⁶⁶ To expand access to services, advocates encourage states to adopt immunity statutes that protect all youth under the age of eighteen from prosecution for any offense that results from their exploitation.⁶⁷

Antitrafficking discourse specifically focuses on victim status as triggering protection and access to support services. This characterization categorically exempts victims, as is the case under statutory rape laws, in order to create unity in youth consent conceptualizations and call for the creation and application of support services. The fact that "children could face very different outcomes depending on how the child's actions are categorized" is troubling to say the least.⁶⁸

Diverting youth from the juvenile justice system and into mandatory programming and services is seen as an effective way to address the issue of supply. Even though antitrafficking advocates challenge the conflation of trafficking and prostitution, these debates are not explicitly had in the juvenile context. The assumption is that youth consent laws assist in implementing the TVPA's victim label. The belief is that consistency in law helps to not only support victims (therefore reducing supply) but also assists the criminal justice system in capturing and sentencing exploiters and buyers (therefore reducing demand).

C. Addressing Demand: Reliance on the Criminal System to Punish and Deter Traffickers and Buyers

The TVPA asserts that severe punishment of CSEC deters the "demand for commercial sex with sex-trafficking victims . . . through consistent enforcement of criminal laws against purchasing commercial sex."⁶⁹ Recommendations include: enforcing existing state and federal laws concerning child sexual exploitation; enhancing penalties against exploiters; developing sentencing guidelines for law enforcement; developing and funding taskforces; training law enforcement; and supporting prosecutors in the prosecution of CSEC cases.⁷⁰ Millions

66. *Id.*; see *Statutory Rape: A Guide to State Laws and Reporting Requirements*, U.S. DEPT OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/hsp/08/sr/statelaws/summary.shtml> (last visited June 10, 2015) (in most states, statutory rape laws set the age of consent to under eighteen years of age).

67. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013), http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf; see POLARIS, *supra* note 64.

68. Adelson, *supra* note 10, at 97.

69. Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. §§ 221(a)(3)(B)(iii), 221(a)(4).

70. See RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO: EXECUTIVE SUMMARY (OF THE U.S. NATIONAL STUDY) at 25 (2001), <https://maggiemcneill.files.wordpress.com/2011/04/estes->

of dollars are allocated to local, state, and federal law enforcement to put the “punish and deter” framework into effect.⁷¹

The FBI’s Innocence Lost National Initiative was developed to address CSEC: “[I]n the 11 years since its inception, [the Initiative] has resulted in the development of 69 dedicated task forces and working groups throughout the U.S. involving federal, state, and local law enforcement agencies working in tandem with U.S. Attorney’s Offices.”⁷² The Initiative has led to the conviction of 1500 traffickers with lengthy sentences.⁷³ The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT) was developed to emphasize the prosecution of buyers and traffickers as sex offenders by eliminating defenses and heightening punishments, such as longer sentences and extended periods of supervision postrelease.⁷⁴ Studies have shown an increase in the average sentence for sex trafficking offenses from fifty-three (53) months in 1999 to eighty (80) months in 2005.⁷⁵

Advocates have challenged the overwhelming emphasis on criminal prosecution by asserting that systemic issues are deprioritized and the criminal policy approach adversely impacts the persons these initiatives supposedly “protect.” Critics, however, tend to offer these critiques in the context of adult sex work without specifically speaking about the negative impact of antitrafficking discourse on youth in the sex trade. Part II seeks to challenge the victim rhetoric within the dominant antitrafficking frame by centering race and the nuanced narratives of Black girls.

II. INTERSECTIONAL FAILURES OF THE PREVAILING FRAME

The historical denigration of Black women and girls makes applying the TVPA complicated. Additionally, the dominant exploiter-victim narrative ob-

weiner-2001.pdf; Ayn Dietrich-Williams, *New Child Exploitation Task Forces Signal Enhanced FBI Effort to Combat Crimes Against Children*, FBI (Jan. 29, 2013), <http://www.fbi.gov/seattle/press-releases/2013/new-child-exploitation-task-forces-signal-enhanced-fbi-effort-to-combat-crimes-against-children>.

71. Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2000) (allocations are in § 113); Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (2003) (allocations are in § 7); Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (allocations are in § 301).

72. *Innocence Lost*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost (last visited May 11, 2015).

73. *See id.*

74. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). *See also Fact Sheet Protect Act*, DEPT OF JUSTICE (Apr. 30, 2003), http://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm.

75. INST. OF MED. & NAT’L RESEARCH COUNCIL, *supra* note 63, at 226.

scures the economic and social realities that serve as pathways into sex work. Even though some advocates challenge the dominant framing of sex trafficking, these critiques are typically limited to the adult context. The framing of CSEC as a problem and the legal interventions proposed by antitrafficking advocates expose the intersectional failures⁷⁶ of the dominant perspective, which assumes that a majority of girls involved in sex work are doing so under the authority and control of an exploiter. This frame fails to offer comprehensive solutions necessary to provide youth with alternatives to sex work.

Additionally, race informs vulnerabilities to criminalization (for both the victim and exploiter) as well as distrust of law enforcement and service providers. Black girls are more likely to be criminalized as prostitutes and Black men are more likely to be prosecuted as traffickers. Even though Black girls are disproportionately detained for prostitution offenses, antitrafficking advocacy materials seldom depict their faces, and the silence around their experiences in antiracist discourses function to marginalize their voices. The nuanced narratives of Black girls involved in sexual exchange require appropriate engagement and responses.

A. Linking the Historical Silencing of Black Women's Exploitation to CSEC

Race plays a large role in shaping adjudicatory outcomes for Black girls in particular. Even though advocates acknowledge how complicated it is to recognize and protect youth involved in sexual exchange, almost no attention has been focused on the role of race in the victim/criminal dichotomy. Thus, advocates fail to offer an intersectional framework.

Intersectionality exposes how race and gender interact to shape Black girls' agency and oppression, the violence they confront, and the consequences of youth prostitution. To advocate for girls coerced into prostitution and for those who are prostituting for survival, advocates need to recognize that conceptions of sexual availability and sexual consent are informed by race. Non-Black girls and women occupy a privileged victim status in sex-trafficking discourse. The absence of intersectionality in this discourse results in an individualistic approach to a structural problem.

Critical race theorist Kimberlé Crenshaw has highlighted the unique space that women of color occupy when it comes to issues of race or gender:

76. "Intersectional failures" is a phrase used by Professor Kimberlé Crenshaw. I was first exposed to this phrase during an event called "State of Female Justice: What Makes You Rise?" as part of the One Billion Rising Campaign. GRITtv, *State of Female Justice: What Makes You Rise?*, YOUTUBE (Feb. 12, 2014), <http://youtu.be/t1K5fcD4PWL>.

The problem is not simply that both [antiracist and feminist] discourses fail women of color by not acknowledging the “additional” issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, [dominant conceptions of] antiracism and feminism are limited, even on their own terms.⁷⁷

Intersectionality is a useful framework in mapping the positionality of Black girls within the juvenile justice system, especially in the CSEC context. As one scholar has argued, “prostitution operates as a site of intersectionality”⁷⁸ because historically ‘Black woman’ and ‘prostitute’ have been interchangeable terms. Because Black girls have been marginalized and underprotected, the very “historical lack of protection becomes a basis for saying no protection is necessary.”⁷⁹ The experiences of Black women become legible only in so much as those experiences fall within those encountered by white women or Black men.⁸⁰ In the context of sexual exploitation, Black girls are granted resources only when they are able to evoke the dominant victim narrative and fit within its confines.

The controlling images associated with Black women and girls have roots in slavery. During chattel slavery, Black women’s bodies were property and were used to produce valuable commodities—enslaved human beings.⁸¹ As Crenshaw argues, “[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection.”⁸² Thus, Black women and girls were not considered rapeable—meaning that Black women’s bodies were rendered fully accessible and Black women were left without legal recourse.⁸³ This access to the Black female body facilitated economic growth and racial subordination in the United States.⁸⁴

77. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991).

78. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 144 (2nd ed. 2000).

79. Kimberlé Crenshaw, *Whose Story Is It Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 403, 430 (Toni Morrison ed., 1992).

80. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143 (1989).

81. See Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 457, 458–59 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

82. Crenshaw, *supra* note 80, at 158–59.

83. YOLANDA M.S. TOMLINSON, BLACK WOMEN’S BLUEPRINT, INVISIBLE BETRAYAL: POLICE VIOLENCE AND THE RAPES OF BLACK WOMEN IN THE UNITED STATES 3 (Sept. 22, 2014), <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/36-police-wapb.pdf> (“As

Controlling images often characterize Black women as “mythical whore[s]” deserving of punishment.⁸⁵ Black women were viewed as failed women, unable to uphold the virtues of piety, purity, submissiveness, and domesticity.⁸⁶ The controlling image of the “jezebel,” a sexually deviant Black woman with an “excessive sexual appetite [that] masculinizes her,”⁸⁷ was developed to justify rape.⁸⁸

Black women and girls were treated as property and characterized as producers of their own harm. In *Killing the Black Body*, Dorothy Roberts states that “Black mothers are portrayed less as inept or reckless reproducers in need of moral supervision, and more as calculating parasites deserving of harsh discipline[,] . . . [as] a monster creating crack dealers, addicts, muggers, and rapists—men who become those things because of being immersed in her culture of poverty.”⁸⁹ These distorted and controlling images of Black women conceptualizes us as false victims and “highly skilled persons in the context of [our] own shady businesses . . . [to] elude arrest.”⁹⁰ Accordingly, Black women are not seen as innocent women in need of support but are instead viewed as manipulative and parasites to society.

These stereotypes coupled with structural inequality reveal Black women’s vulnerability to racial profiling and police abuse, even though highly punitive criminal policies are viewed as primarily targeting Black men.⁹¹ The overrepresentation of Black women and girls in criminal systems for prostitution offenses, for example, is evidence of this.

bodies to produce other enslaved bodies, as flesh to satisfy their slave masters desires, as slaves to be worked as needed, and as property to be sold at will, Black women were deemed not able to be raped. . . . Furthermore, Black women could not be raped because they were not legally people, but rather property.”)

84. See Davis, *supra* note 81, at 460.

85. COLLINS, *supra* note 78, at 147 (“The mythical rapist implies the mythical whore—and a race of rapists and whores deserves punishment and nothing more.”).

86. See generally *id.* at 74–81.

87. *Id.* at 83.

88. See *id.* at 71 (“The allegedly emotional, passionate nature of Black women has long been used to justify Black women’s sexual exploitation.”); *id.* at 140 (discussing nineteenth century literature that viewed Black women as animals with uncontrollable sexual appetites where they would have sex with anything, including apes); see also Davis, *supra* note 81, at 460 (“Enslaved women’s sexuality was made available simultaneously as an outlet for male eroticism, a market commodity, a tool of discipline, and an ideological device to justify slavery.”).

89. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 18 (1997) (emphasis omitted).

90. Javidan, *supra* note 29, at 242.

91. Noah Berlatsky, *Black Women Profiled as Prostitutes in NYC*, REASON (Oct. 1, 2014), <http://reason.com/archives/2014/10/01/nypd-profiles-sex-workers-too>; Andrea Ritchie, *What’s Gender Got To Do With Racial Profiling*, RIGHTS WORKING GROUP (Sep. 14, 2012, 11:08 AM), <http://www.rightsworkinggroup.org/content/whats-gender-got-do-with-racial-profiling>.

The 2013 FBI Uniform Crime Report indicates that prostitution arrest rates for minors and adults plummeted between 2004 and 2013.⁹² Even though arrest rates have declined over this ten-year period, the racial disparities in the data are striking. Although the Black population in the United States is approximately 13.2 percent,⁹³ Black women are disproportionately arrested for prostitution offenses. In 2013, 41.4 percent of people arrested for prostitution were Black and 54 percent were white.⁹⁴ Latinos make up about 17.7 percent of the white demographic.⁹⁵ The demographics are even more disproportionate for minors as 61.9 percent of those arrested for prostitution under the age of eighteen were Black.⁹⁶

Black girls are hypervulnerable to arrest for prostitution offenses, yet their stories and faces are seldom heard or seen.⁹⁷ The images used by antitrafficking advocates are not designed to reflect the girls most affected but are instead designed to solicit a sense of empathy and connection from the viewer.⁹⁸ Consequently, advocates use images of young white girls, which elicit a sense of concern and urgency. While “white children and women are considered victims of prostitution, . . . [B]lacks are considered perpetrators of prostitution.”⁹⁹ The characterization of Black women and girls as offenders limits the resources available to them.

Additionally, antiracist discourses challenging mass incarceration and racialized policing fail to highlight the narratives of criminalized Black girls. Black

92. See Table 29: *Estimated Number of Arrests United States, 2013*, FBI, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls (last visited June 14, 2015) (showing that prostitution arrest rates for minors decreased by 52.5%, from 1,157 arrests to 550, and rates for adults decreased by 35.4%, from 54,212 arrests to 34,012).

93. *State and Country QuickFacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 14, 2015).

94. *Table 43: Arrests by Race, 2013*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43> (last visited June 14, 2015).

95. *Id.*

96. *Id.*; see also WALKER, *supra* note 33, at 19 (“[Black] youth make up a disproportionate number of CSE youth in California. [Black] girls are arrested at a higher rate than white girls, and their age of entry into prostitution appears to be younger.”).

97. For examples of advertisements, see *Can You See Her?*, U.S. DEPT’HOMELAND SEC., http://www.dhs.gov/sites/default/files/images/blue-campaign/BC_sex-trafficking-portrait.jpg (last visited May 11, 2015); *Look Beneath the Surface*, U.S. DEPT’HEALTH & HUM. SERVS., http://www.acf.hhs.gov/sites/default/files/orr/look_beneath_the_surface_poster_4_english.pdf (last visited June 14, 2015).

98. See Kittling, *supra* note 14, at 920 (footnote omitted) (“[N]ational campaign[s presented] images of white children as prostitutes. The rationale behind this conclusion was that the public viewed domestic prostitutes as children of color and, therefore, cared less about helping these victims. By portraying the children as white, the public would be able to better relate to the children and would be more likely to view them as victims.”).

99. *Id.*

males are exceptionalized¹⁰⁰ while the experiences of Black women and girls are marginalized. For example, millions of dollars have been allocated to funding programs that focus exclusively on Black boys and men by private funders. The U.S. government has also turned a blind eye to the plight of Black girls, as the Obama administration recently launched the “My Brother’s Keeper” Initiative without an analog for Black girls.¹⁰¹ Ignoring the intersectional vulnerabilities of Black women and girls, particularly in the sexual violence context, renders our needs indistinct and unimportant within preexisting frames.

The stereotyping of Black girls impacts their access to support under the TVPA. Additionally, the stigmatization of sex work forecloses access to support for Black girls, and other marginalized youth, who are exchanging sex for survival. Black girls can benefit the most from the decriminalization of youth prostitution because they are disproportionately arrested for prostitution offenses. However, the victim angle advanced by antitrafficking advocates does not overcome the racial biases within the juvenile justice system and presumes a narrative that youth often do not identify with.

B. Race, Gender, the Juvenile Justice System, and Safe Harbor Laws

The juvenile justice system is a gender-policing institution. At its inception, “[e]arly juvenile justice reformers . . . focused their efforts” to white European-immigrant youth.¹⁰² Similarly, the focus of the child welfare system was to provide assistance to children who were considered salvageable.¹⁰³ The early juvenile justice system also “frequently intervened to save wayward girls from perceived futures in prostitution or criminality and redirect them toward marriage, motherhood, and home life. . . . [Thus,] the system’s role was to instill in them appropriate morality.”¹⁰⁴ Girls were punished for not upholding dominant gender

100. See Paul D. Butler, *Black Male Exceptionalism?: The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485, 485 (2013) (describing Black male exceptionalism as the positioning of Black men as “endangered species” and thus at a higher risk of violence and policing than any other group).

101. See *id.* at 487; *Did You Know? The Plight of Black Girls & Women in America*, AFRICAN AM. POL’Y FORUM, http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/v/5422de0ee4b080d53cf82554/1411571214756/Did-You-Know_Pligh-of-Black-Women.pdf (last visited May 11, 2015) (“Over the last decade over 100 million dollars has been invested in achievement, dropout prevention, and mentoring initiatives exclusively targeting Black and brown boys. During this same period, less than 1 million dollars in funding targeted Black and brown girls.”).

102. Kristen Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 405 (2013).

103. See *id.*

104. Sherman, *supra* note 38, at 1590.

ideals,¹⁰⁵ or for exuding immoral conduct.¹⁰⁶ Girls were expected to be obedient and modest.¹⁰⁷ As a result, “girls were often charged with ‘incurability’ as a proxy for being sexually active” and subsequently detained in juvenile facilities.¹⁰⁸

The incarceration of girls for violating gender norms was a masked form of structural gender discrimination.¹⁰⁹ This discrimination is continuously rationalized when the system relies on incarceration in order to provide support services, and protection from sexual exploitation.¹¹⁰ Despite the juvenile justice system’s alleged rehabilitative purpose, girls experience physical and sexual abuse within detention facilities and are released without alternatives to sex work.¹¹¹

Black girls are particularly vulnerable because Black youth in general are commonly perceived as incorrigible and hence treated more harshly by the criminal system. It has been considered a waste of resources to provide services to Black children because Black youth have been viewed as the “perennial ‘lost cause[,]’ . . . lacking the physical, moral, and intellectual capacity on which normalization would depend, [making them ineligible for] benefit[s] from [juvenile justice reform] efforts.”¹¹² The “other”-ing of Black youth has consequently reified negative stereotypes within the juvenile justice system. As a result, juvenile justice system officials are more likely to attribute responsibility, heightened crime proclivity, and recidivism to Black youth.¹¹³ Therefore, “while courts may forgive or excuse white youth for engaging in reckless adolescent behavior, courts often perceive youth of color as wild, uncontrollable, and morally corrupt and consequently hold them fully culpable for their conduct.”¹¹⁴ This controlling image shapes how the juvenile justice system interacts with Black girls in particular.

As previously mentioned, some advocates have supported safe harbor laws—which are enacted to provide exploited youth with an exit-strategy—if they are eligible and comply with program requirements. Safe harbor laws offer conditional immunity and involve juvenile justice system discretion. Proponents of safe harbor laws argue that discretion is key because some youth warrant secure detention for rehabilitation purposes.¹¹⁵ They argue that unconditional decrimi-

105. See Nanda, *supra* note 58, at 1529.

106. See Sherman & Grace, *supra* note 14, at 345.

107. Sherman, *supra* note 38, at 1586.

108. Sherman & Grace, *supra* note 14, at 345.

109. See Sherman, *supra* note 38, at 1586.

110. See *id.* at 1617.

111. See Javidan, *supra* note 29, at 252.

112. Henning, *supra* note 102, at 405–406.

113. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 494, 499 (2004).

114. *Id.* at 424.

115. See Mir, *supra* note 14, at 167–68.

nalization encourages sexual exploitation because exploiters would continue evading arrest without the risk of the minor being incarcerated and used as an informant against them.¹¹⁶

Discretion operates to provide resources to a limited class of minors. Some states can proceed with delinquency proceedings if the exploited youth had previously been adjudicated for prostitution or had refused to accept specialized services.¹¹⁷ In New York, for example, there is a rebuttable presumption of sexual exploitation based on a minor's history of recidivism.¹¹⁸ Safe harbor laws are premised on the need for legal protection and services for minors induced into sex work. Therefore, minors engaged in sex work for survival lie outside of the support scheme. The discretion within the juvenile justice system disproportionately leaves Black girls limited in their receipt of support services.

C. Positioning Survival Sex in CSEC Discourse

Minors exchanging sex for basic necessities complicate the dominant antitrafficking frame. The image of a minor under the authority of an exploiter conflicts with the reality that most minors in the sex trade are doing so independently and for survival.¹¹⁹ Some advocates challenge the characterization of youth as self-prostituting, arguing that minors are victims by virtue of their histories of abuse and inability to consent because of their age.¹²⁰ Others believe, however, that a

116. *See id.*

117. *See* WALKER, *supra* note 33, at 49.

118. *See* Mir, *supra* note 14, at 164. (specifically noting that New York's Safe Harbor Act "provides judges with discretion to grant delinquency petitions or charge minors as adult offenders in cases where the presumption of sexual exploitation is overcome or where the minor has been given a number of rehabilitative opportunities and the judge decides, based on a comprehensive set of individualized factors, that no further rehabilitative efforts will help"); *see also* Sherman & Grace, *supra* note 14, at 345 ("New York's Safe Harbor for Sexually Exploited Children Act . . . allows the court to reinstate the delinquency charges if the youth is unwilling to cooperate with specialized services.") (internal citation omitted).

119. *See* MARCUS ET AL., *supra* note 37, at 225–27 (highlighting the fact that studies conducted on CSEC present skewed data that limits the narrative to the victim-trafficker dyad and arguing "that the narrative of pimp trickery and coercion distorts reality in three ways: it (1) overestimates the role of pimps in street sex markets, (2) overemphasizes the impact of the initial recruitment stage on subsequent practices, and (3) masks or simplifies the difficult and complex choices and contingencies faced by minors who sell sex"); *see* DANK ET AL., *supra* note 18.

120. *See* Mir, *supra* note 14, at 163 ("Most often, minor girls who are picked up for prostitution offenses are perceived as self-prostituting, rather than as forced accomplices. In reality, however, minors are victims of child sexual abuse and suffer from physical, mental, and emotional violence because they are subjected to rape on a daily basis."); *id.* at 169 ("Initially, trafficking victims may appear to be freely prostituting themselves and thus do not look like obvious victims . . . these young women generally do not self-identify as victims and are either too frightened or reluctant to cooperate, which places the burden on both law enforcement and the legal system to ascertain their exploitation.").

line should be drawn between preteens and older teens, treating preteens as victims and teens closer to the age of majority as criminals because of their greater ability to consent.¹²¹ This type of reasoning asserts that “[v]ictims of sex trafficking [are different] from young girls and women who are part of the criminal cycle.”¹²² This sentiment exposes the fact that the inability of youth to consent to sex is contested—lines are being drawn. Age of consent laws do not help to resolve this debate because a majority of states set the age of consent below eighteen.¹²³

While the TVPA and dominant antitrafficking discourse make clear that youth under the age of eighteen are victims, service providers and law enforcement on the ground often think and behave otherwise. The prevailing narrative of youth prostitution promote images of force and abusive male dominance. When law enforcement and service providers encounter other narratives in practice, youth falling outside of the dominant frame are perceived as “criminals.” Therefore, the inconsistencies in age of consent laws and the victim status asserted by the TVPA makes youth who are exchanging in sex independently contested victims.

The Urban Institute report, “Surviving the Streets of New York: Experiences of LGBT Youth, YMSM, and YWSW Engaged in Survival Sex,” demonstrates the tension between the victim paradigm and the reality that most minors are involved in sex work out of survival by highlighting the experiences of LGBTQ youth. In particular, the report focuses on the economic and social factors funneling youth into survival sex, the disproportionate number of youth of color exchanging sex for necessities, and the development of complex peer networks among youth of color.¹²⁴

The findings within the Urban Institute report parallel findings in the article “Conflict and Agency among Sex Workers and Pimps: A Closer Look at

121. See e.g., Adelson, *supra* note 10, at 119–20 (“A longtime official at DCF recently mentioned the need to communicate to hotline workers that ‘All child prostitutes are not victims of trafficking.’ She stated . . . that young women who had reached sixteen years of age were prostitutes, not victims of trafficking. . . . This DFC official also stated the importance of distinguishing trafficking victims from voluntary prostitutes because the state has scarce resources and ‘prostitutes should not be taking up resources devoted to trafficking victims.’”).

122. Mir, *supra* note 14, at 169.

123. *AOC Chart for the 50 States & D.C., AGE OF CONSENT*, <http://www.ageofconsent.us> (showing that twelve states set the age of consent at eighteen, while a majority of states set the age of consent at sixteen, and that the age of consent in states conflict with the presumption within the TVPA that youth engaged in sex work are victims). This Comment does not argue for heightened age of consent laws but instead highlights the inconsistencies in legal classification of youth consent.

124. See DANK ET AL., *supra* note 18, at 4, 15, 18 (cisgendered girls are more likely to be involved with an exploiter); Adelson, *supra* note 10, at 103.

Domestic Minor Sex Trafficking” which challenges popular stereotypes about CSEC and exploiters.¹²⁵ The authors of this article interviewed more than 600 active sex workers and pimps from 2008–2013, resulting in three separate studies.¹²⁶ Seventy percent of active sex workers interviewed were minors.¹²⁷ An additional 19 percent had begun selling sex before the age of eighteen.¹²⁸

The antitrafficking frame leaves little room for complex narratives because the discourse miscalculates the presence of exploiters and obscures the various pathways into sex work for minors. The results within the article indicate, “stereotypical pimps are far less common and important to street sex markets.”¹²⁹ Minors were almost twice as likely to self-initiate into sex work than adults.¹³⁰ Even though violent and controlling pimps do exist and the purpose of this Comment is not to challenge those lived experiences, most of the minors interviewed in this study did not identify with the prevailing narrative.¹³¹ Additionally, a majority of minors who were directly coerced and kept in sex work were exploited by a parental figure.¹³²

The study also found that pimps were cautious about “managing” minors. Exploiting a minor was referred to as “[p]imp suicide” because “minors . . . were unreliable and could not bring in enough money to warrant the investment in time, clothing, and emotional energy”¹³³ This offers more evidence as to why majority of youth are in the sex trade independently.

Additionally, in instances where a trafficker exploits youth, the power dynamics within their relationship dissipates or terminates completely over time.¹³⁴ This research reveals the false proposition of antitrafficking advocacy that minors involved in sex work do so primarily under the iron fist of exploiters. Consequently, the dominant narrative fails to recognize the agency of young women involved in sex work and the trade-offs they make. The researchers state, “many of our sex worker respondents who were recruited by pimps had gone into the situa-

125. MARCUS ET AL., *supra* note 37, at 228.

126. *Id.* at 228.

127. *Id.*

128. *Id.* at 229.

129. *Id.* at 231.

130. *Id.*

131. *Id.* at 236, 241 (“The conventional narrative of deception, force, or the captive slave recruited and tied to a pimp through love, debt, addiction, authority, or coercion—did reflect the experiences of some individuals, but for the vast majority this narrative did not resonate.”).

132. *Id.* (“In the four other cases we encountered where a sex worker reported being kept in “the life” through direct coercion, the pimp was an informal or legal guardian, or a friend or intimate companion of a parent. This type of pimping (parental) accounted for some of the youngest ages of initiation into sex work, and was the most coercive type of relationship.”).

133. *Id.* 240–241.

134. *Id.* at 242.

tion knowing that they were trading an oppressive situation in a shelter, group home, or natal family for a pimp who might prove violent, abusive, or exploitative.”¹³⁵ Many youth felt compelled into sex work due to a variety of life circumstances, some of which can also be tied to race.¹³⁶

As one Black woman, who was recruited into sex work at 15 years old stated:

I was in a group home, and I was sittin’ on my steps and I was cryin’ because they’re givin’ you allowance—\$20 a week—and then you’re not allowed to do certain types of jobs because you have a curfew. And if you miss curfew, they ship you somewhere else. So I was just at my rope’s end. The things that he was sayin’ to me, it sounded good. So, it was like, maybe I can do this. But once I started seein’ certain things and certain actions, I might as well have stayed in the hell I was in.¹³⁷

The child welfare system and limited economic prospects facilitated her entry into sex work. And economic forces impacted her decision to exit. Although 87.2 percent of youth interviewed in the study wanted to leave sex work, none of them identified an exploiter as an impediment.¹³⁸ Barriers to exiting sex work include the lack of employment, housing, and educational opportunities.¹³⁹

Thus, the moral panic surrounding CSEC produces a false narrative and limited interventions.¹⁴⁰ The narrative of seduction, coercion, and physical and mental abuse that pervades antitrafficking discourse is not reflective of recent research uncovering the many pathways to sex work for minors in the United States.¹⁴¹

Instead of helping youth, the dominant victim framework is harmful. Youth have viewed antitrafficking advocacy and the TVPA framework as problematic.¹⁴² Approximately only two percent of the study participants in the Con-

135. *Id.* at 233.

136. *Id.* at 243.

137. *Id.* at 234.

138. *Id.* at 231.

139. *Id.*

140. *Id.* at 242 (“These findings suggest that roughly 2 percent of all the sex workers whom we interviewed ... were in a relationship with a violent pimp. It is important to note that a majority of these relationships involved individuals in a formal or informal parental role over the sex worker.... We recognize that situations of oppression and captivity do exist ... [but our research calls into] question the degree to which the dominant narratives of underage sex trafficking and resultant policies can protect the majority of vulnerable youth engaged in commercial sex markets.”).

141. *Id.* at 228 (“Popular media ... present narratives about pimp trickery, seduction, captivity, and brutality as the dominant or sole mode of recruitment and management.... Law enforcement officials put forth pimp tattoos on “rescued” sex workers (illustrating “ownership”) and other extreme (and possibly rare) versions of pimp brutality as the norm in presentations to news media ... and antitrafficking activists and popular psychology writers endow pimps with remarkable mind-control powers.”).

142. *Id.* at 242.

flict and Agency article reported that, when in trouble, they would seek out support from service organizations.¹⁴³ The researchers therefore concluded, “the logical premise of victimhood upon which [the] decriminalization [within the TVPA framework] rests is too narrowly construed to adequately respond to the realities these minors confront.”¹⁴⁴ The Urban Institute reports analogous findings—LGBTQ youth engaged in sex work often felt disillusioned and frustrated with social services and felt that service providers did not empathize with their particular experiences.¹⁴⁵

Calls for holistic approaches are advocated for in order to meet youth where they are.¹⁴⁶ Holistic approaches include understanding vulnerabilities to incarceration and barriers to employment. Youth on the street are frequently arrested for low-level crimes committed in order to obtain basic necessities.¹⁴⁷ Arresting youth for these offenses have collateral consequences, such as furthering instability and difficulty in obtaining employment.¹⁴⁸

As an alternative to current practices, proponents of the Harm Reduction Model (HRM)¹⁴⁹ for example, call for the decline in harm associated with risky

143. *Id.* (“[F]rom their perspectives, the antitrafficking discourses and practices that they would encounter in these organizations threaten to criminalize their adult support networks, imprison friends and loved ones, prevent them from earning a living, and return them to the dependencies of youth.”).

144. *Id.* at 243.

145. DANK ET AL., *supra* note 18, at 2, 61, 64.

146. MARCUS ET AL., *supra* note 37, at 243 (The researchers suggest the following: “We argue for a holistic approach when exploring the social dynamics of youth participation in commercial sex markets; one that accounts for the experiences, vulnerabilities, and needs of young sex workers. We believe that this requires careful and respectful research, done in situ among those whom the TVPA has defined as domestic child sex trafficking victims and their social networks. Our findings suggest that effective policy for the majority of this group must recognize their dignity and autonomy; help them fight addiction, continue their education, obtain stable housing, build marketable skills; and address abusive parental relationships, rather than focus obsessively on their sex lives.... We argue that the precondition for such research is setting aside ideological positions about sex work and seeking a deeper, broader, and more dynamic understanding of the being and becoming experienced by young people in commercial sex markets.”).

147. ESTES & WEINER, *supra* note 70, at 9; DANK ET AL., *supra* note 18, at 32 (“Of the 70 percent of youth who reported being arrested, only 9 percent reported being arrested for prostitution. The majority of the prostitution-related arrests (53 percent) led to prostitution charges, while 18 percent of youth were charged with soliciting, 12 percent with loitering for the purposes of prostitution, and 18 percent were not charged at all.”).

148. DANK ET AL., *supra* note 18, at 32, 34.

149. For information on the Harm Reduction Model (HRM), see generally Mark O. Bigler, *Harm Reduction as a Practice and Prevention Model for Social Work*, 10 J. BACCALAUREATE SOC. WORK 69, 73 (2005) (“[T]he overriding guiding principle is ‘reducing the harm associated with specific high-risk behavior.’ . . . Harm-reduction-based interventions address both the range and the depth of harm through a combination of practical direct services and long-term humanitarian goals. The model recognizes that harm is multidimensional and accepts the reality that almost all behavior poses some degree of risk to the individual and/or to society as a whole.” (internal citations omitted)). Bigler also notes,

behavior in order to move beyond a medicalization of these behaviors that tends to oversimplify the lived realities of persons in need.¹⁵⁰ Providing unconditional resources combats the victim-offender binary. This model meets youth where they are without forcing a drastic, and sometimes, unrealistic lifestyle change. In the case of girls involved in the sex trade, HRM can help address harms associated with street life, such as access to sexual health care via STI testing and contraceptives¹⁵¹ in addition to legal, employment, and housing services. Studies have shown that the HRM is more effective than abstinence-based programs.¹⁵²

The philosophy of HRMs clashes with safe harbor laws.¹⁵³ HRM “encourage[s] incremental behavior change toward safer behavior and view[s] any positive change in undesired, problematic, or risky target behaviors as a successful educational and/or therapeutic outcome.”¹⁵⁴ A legal regime following HRM philosophy would recognize the unique position of youth in sex work, offer services regardless of compliance, and empower youth by promoting nonpunitive interventions no matter the amount of times they have been adjudicated.¹⁵⁵ Even though the HRM was developed to respond to substance

The essence of harm reduction has five primary principles: (a) pragmatism, doing what works; (b) humanistic values, respecting the dignity and rights of the person, regardless of the nature of the risk-taking behavior; (c) focus on harms, giving greatest attention to decreasing the negative consequences of a given behavior to self, others, or the broader society, rather than putting all effort into eliminating the problematic behavior itself; (d) balancing costs and benefits, determining whether the cost of an approach is warranted compared to some other intervention or to no intervention at all; and (e) hierarchy of goals, prioritizing goals and engaging a person to address the most pressing needs first.

Id. at 74 (internal citations omitted). HRM began as a public safety model aimed at adults with substance abuse and has since been applied to other issues such as sexual health education and alcohol use. The model is used as an alternative to abstinence-based programs for those who perceive abstinence as unfeasible yet recognize a need to limit (but not erase) the behavior or action. These people were previously excluded from abstinence programs. This model is particularly useful for children because risk-taking and experimentation are part of the adolescent development process. See CANADIAN PAEDIATRIC SOC'Y, *Harm Reduction: An Approach to Reducing Risky Health Behaviours in Adolescents*, 13 PAEDIATR CHILD HEALTH 53, 53–56 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2528824/pdf/pch13053.pdf>.

150. See Bigler, *supra* note 149, at 71.

151. See CANADIAN PAEDIATRIC SOC'Y., *supra* note 149, at 54.

152. See *id.* at 55; see also Bigler, *supra* note 149, at 71–72 (arguing that HRM effectiveness can be attributed to the limiting of client and practitioner frustration and increased creativity of interventions).

153. See Sherman & Grace, *supra* note 14, at 334 (explaining that “a harm reduction approach . . . is controversial and contrary to the prevailing system view that girls must fully leave CSEC in order to recover from their abuse”).

154. Bigler, *supra* note 149, at 74.

155. See *id.* (“[HRM] promotes non-punitive responses where mutual support and accountability exist between individuals and the communities in which they live. Simultaneously, harm-reduction approaches encourage individuals to be competent and responsible in their entire lives.”) (internal citations omitted).

use, HRM is an effective tool for service providers supporting youth involved in survival sex, especially given that youth often feel misunderstood and stigmatized by service providers.

The Chicago-based Young Women's Empowerment Project (YWEP) is a youth-led organization focused on providing safe spaces and nonjudgmental programming to youth who are currently or formerly involved in sexual exchange or other street economies.¹⁵⁶ YWEP asserts the value of the HRM in helping youth survive and heal:

It is not just about harm reduction in terms of drug use or safer sexual practices. It applies to all aspects of girl's lives and how they negotiate an unsafe world and keep themselves physically, emotionally and spiritually intact. Girls use harm reduction to safety plan and stay safe. Girls talked about practicing it in all areas of their lives, from creating safety plans, to avoiding violence, to safer drug use. A YWEP member looking at the data concluded "Girls apply harm reduction to their lives broadly to reduce harm in multiple areas."¹⁵⁷

The HRM model was also used as a "transformative justice approach – [helping youth to] rely[] upon each other for the help that the institutions claimed to provide but did not."¹⁵⁸ Even though girls utilize a harm reduction approach, service providers and legal interventions fail to do so.

The antiprostitution stance of antitrafficking legal interventions impacts access to comprehensive, non-stigmatizing resources. The 2003 TVPA states that:

No funds made available to carry out this division, or any amendment made by this division, may be used to implement any program that targets victims of severe forms of trafficking in persons ... through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. The preceding sentence shall not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked.¹⁵⁹

156. YOUNG WOMEN'S EMPOWERMENT PROJECT, *GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL* 10 (2011), <https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf>.

157. *Id.* at 31.

158. *Id.* at 31.

159. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong., § 7 (2003).

In order to receive federal funding, “[m]any organizations have purged prohibited words such as “sex work” and “harm reduction” from their materials for fear of being seen as “promoting” prostitution.”¹⁶⁰ Instead, federal funding is funneled into faith-based organizations and other antiprostitution organizations.¹⁶¹ Requiring antiprostitution stances impacts the ability of organizations to provide nonjudgmental services to stigmatized populations.¹⁶²

Antitrafficking advocates and the legal system struggle to reconcile prostitution as a survival strategy and prostitution as an exploitative enterprise.¹⁶³ The experiences of Black girls in particular reveal these advocacy gaps because Black girls are disproportionately criminalized for prostitution, regardless of their pathway to sex work. Their unique positionality calls for an approach responsive to complex narratives and needs.

Antitrafficking discourses fail to speak specifically to racism and structural issues proliferating the trafficking market. Additionally, the types of services youth have access to are constrained by dominant political ideologies about sex work, which leads the government and antitrafficking advocates to rely on the criminal justice system. The prosecution of exploiters is the primary tool utilized to address CSEC at the expense of leaving structural inequalities unmoved.

D. Interest Convergence and Overreliance on Policing Mechanisms

As mentioned throughout this Comment, the dominant antitrafficking narrative invokes images of youth exploited by traffickers. Accordingly, responses to CSEC promote enhanced sanctions for traffickers and buyers. However, centralizing law enforcement in antitrafficking interventions ignores the tumultuous relationship between the criminal justice system and communities of color.¹⁶⁴ The bipartisan support of punitive antitrafficking efforts can be analyzed through the lens of Derrick Bell’s interest convergence theory. This theory posits that “[t]he interest of [B]lacks in achieving racial equality will be accommodated only

160. Chuang, *supra* note 2, at 1713.

161. *Id.* at 1715.

162. *Id.* at 1686, 1713.

163. See Javidan, *supra* note 29, at 253.

164. See generally Bernstein, *supra* note 6, at 144 (Dominant antitrafficking discourse “locates all social harm *outside* of the institutions of corporate capitalism and the state apparatus. In this way, the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviors, rather than enemies, of unskilled migrant workers, and the responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men: foreign brown men (as in the White Slave trade of centuries past) or even more remarkably, African American men living in the inner city.”).

when it converges with the interests of whites.”¹⁶⁵ Applying this theory more broadly, dominant antitrafficking discourse represents a hodgepodge of advocates (across the political spectrum) coming together to ‘advance’ the rights of women and children who have been sexually exploited.¹⁶⁶ However, the politics of these advocates are infused with assumptions that impact how the problem is conceptualized and addressed.

Antitrafficking advocates have pushed for increasing the force of the criminal justice system. For example, the founder and president of the International Justice Mission, Gary Haugen, has stated, “Trafficking is not a poverty issue. It’s a law enforcement issue.”¹⁶⁷ Viewing CSEC as a law enforcement issue is an individualized approach, which absolves society of any guilt for its role in turning a blind eye to social, educational, and economic forces that provide youth with very few alternatives.¹⁶⁸

As mentioned in Part I, studies have shown an increase in the average sentence of traffickers from fifty-three months in 1999 to eighty months in 2005.¹⁶⁹ Increasing arrests and prison terms produce racialized consequences: “Nonwhite offenders received longer prison terms (about 16 months longer) than white offenders.”¹⁷⁰ Additionally, offenders charged with sexual exploitation with lower levels of education and previous criminal histories faced longer sentences as well.¹⁷¹ Just as other tough on crime initiatives have resulted in the overpolicing of Black communities, racial profiling operates in the prosecution of

165. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

166. See generally Bernstein, *supra* note 6, at 144 (“Yet what binds together all of these constituencies—liberal as well as conservative evangelicals, Democrats as well as Republicans, and many mainstream feminists—is a historically significant consensus around corporate capitalist ideals of freedom and carceral paradigms of justice.”).

167. *Id.* at 137.

168. Bernstein, *supra* note 6, at 144.

169. INST. OF MED. & NAT’L RESEARCH COUNCIL, *supra* note 63, at 29; see generally Bernstein, *supra* note 6, at 143 (“[P]imps can now be charged with the federal crime of sex trafficking and given upward of ninety-nine-year prison sentences; prostitutes can be apprehended by law enforcement as a means of securing their testimony in their “traffickers” prosecutions; and clients (whose “demand” for the services of prostitutes is declared by the [TVPA] to be the underlying cause of trafficking) can be arrested and their cars apprehended as a means of financing “antitrafficking” activities.”).

170. WILLIAM ADAMS ET AL., U.S. DEPT’ JUSTICE, EFFECTS OF FEDERAL LEGISLATION ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 7 (2010), <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf>.

171. See *id.*

sexual exploitation cases. These racial disparities reveal that the stereotypical pimp is the Black man.¹⁷²

As one scholar has noted, antitrafficking advocates evoking the slavery narrative in connection to sexual exploitation fail to recognize “the sad irony of throwing poor [B]lack people in jail as a means of “fighting slavery.”¹⁷³ Another point of irony is that “modern day slavery” and “abolitionism” is ascribed to activists doing the opposite of antitrafficking advocates—fighting against the prison industrial complex.¹⁷⁴ “[The] efforts of contemporary antitrafficking activists have relied upon strategies of incarceration as their chief tool of “justice,” ensuring that increasing numbers of men and women of color who participate in the street-based sexual economy will find themselves there, precisely under the guise of being delivered out of slavery into freedom.”¹⁷⁵ The assumption that criminal justice interventions are the answer has produced severe consequences for Black women and men, as well as other people of color. Developing a framework responsive to diverse needs and narratives is crucial; otherwise, youth are forced to choose one hell over another.

III. A REVISED FRAME: CENTERING NUANCE NARRATIVES, PEER-LED SUPPORTS, AND NONJUDGMENTAL SERVICES

“Victim” is a political label that carries with it assumptions and exclusions. Even though Black girls are overrepresented in the prosecution of prostitution offenses, the dominant framing of CSEC does not explicitly engage race and its impact on victim-making. By excluding race from the dominant frame, interventions fail to develop comprehensive remedies to address the particular needs and the economic deprivation that facilitates the exploitation of Black girls in low-income communities. This Part suggests a revised framing of CSEC, centering the experiences of Black girls and other marginalized youth in order to understand and address the push-and-pull factors which make youth hypervulnerable to sexual exploitation and/or survival sex. The intent here is not to propose programs but rather to promote dialogue that will spark the development of comprehensive legal and social solutions. Diverse narratives lead to diverse responses. This Part argues that advocates should elevate the narratives of Black girls and

172. MARCUS ET AL., *supra* note 37, at 227 (“Early studies and portraits of pimps in the United States centered on stereotyped, typically African American, ‘parasites,’ who were alternately glorified and derogated.”).

173. Bernstein, *supra* note 6, at 142.

174. *Id.* at 143.

175. *Id.*

push for comprehensive support services that are non-stigmatizing and meet youth where they are.

Centering the intersectional vulnerabilities of Black girls requires empowering youth and communities of color as a whole. Empowerment has been described as

requir[ing] an understanding that powerlessness is a result of structural and institutional forces that allow for inequality in power and control over resources. Therefore, empowerment should be a process that aims to identify and change the distribution of power within a culture to achieve social justice.¹⁷⁶

Thus, empowerment requires the naming of structures responsible for causing harm. Economic disparities and limited social supports place youth in precarious circumstances, where they are hypervulnerable to exploitation and hyperexposed to prostitution as a means of self-sufficiency. The belief that exploiter impunity is the primary culprit obscures the role of deep poverty.

As discussed in this Comment so far, Black girls and women have been historically excluded from protection and support. Developing a trope, or rhetorical device, that acknowledges these past and current experiences with racial and gender injustice is important to the empowerment of Black girls and women. Positing a discourse that acknowledges and responds to the lived realities of Black women and girls, however, is challenging but not impossible.

In creating Black narrative, Black writers have developed common tropes that are key within the Black literary tradition. They represent common themes, characters, and narratives with symbolic significance. In general, tropes can evoke memories and can serve as a community-based call to action.¹⁷⁷ For instance, the powerful lynching trope is used to convey a particular narrative, acknowledge a particular reality of racial terror, and narrate the gravity of Black subjugation.¹⁷⁸ The lynching trope, however, is linked to the Black male experience.¹⁷⁹

Tropes triggering memories of Black female victimization are rare.¹⁸⁰ In a talk at the New School between bell hooks and Melissa Harris-Perry, Harris-Perry spoke about the power of creating tropes related to Black women's victimi-

176. BERNIS, *supra* note 46, at 154 (internal citation omitted).

177. See Video, *Melissa Harris-Perry and bell hooks Discuss Black Womanhood, Politics and Media* at 1:23:50–1:27:17, HUFFINGTON POST (Nov. 13, 2013, 8:34 AM), http://www.huffingtonpost.com/2013/11/08/melissa-harris-perry-bell-hooks_n_4242909.html.

178. *See id.*

179. *See id.*

180. *See id.*

zation.¹⁸¹ She stated that sexual violence of the past is a familiar narrative.¹⁸² Yet this narrative rarely enters into dominant discourse, including antiracist and feminist discourses.¹⁸³ The particular vulnerabilities and experiences of Black women and girls are seldom understood and are often questioned.

Black women and girls have resisted attempts to limit our self-expression and self-determination. For example, youth have organized, conducted research, and pushed back against interventions that obscure their lived realities, asserting that:

Social justice for girls and young women in the sex trade means having the power to make all the decisions about our own bodies and lives, without policing, punishment, or violence. Our community is often represented as a “problem” that needs to be solved or we are portrayed as victims that need to be saved by someone else. We recognize that girls have knowledge and expertise in matters relating to our own lives that no one else will have. **We are not the problem—we are the solution.**¹⁸⁴

Youth in the sex trade are their own experts and are working in community with each other for resistance, survival, and healing.¹⁸⁵ Dominant antitrafficking rhetoric leaves little room for youth to speak their truths. The Young Women’s Empowerment Project (YWEP) in Chicago represents a direct challenge to the dominant frame by offering an example of youth actively and fiercely developing their own social support systems and self-care principles.¹⁸⁶ YWEP notes: “[Youth] are more than [their] trauma- [they] are fighters with real strength that needs to be honored and respected.”¹⁸⁷

Peer-led outreach and comprehensive drop-in services are powerful harm reduction approaches.¹⁸⁸ In the Urban Institute’s report, youth identified the need for comprehensive support services on their own terms. These support services included identifying employment opportunities, securing housing, and continuing their education.¹⁸⁹ Convenient access to comprehensive and centralized support such as healthcare, legal aid, and mental health in a non-judgmental setting were suggested.¹⁹⁰ Improving access to public benefits is another crucial

181. *See id.*

182. *See id.*

183. Crenshaw, *supra* note 77, at 1269.

184. YOUNG WOMEN’S EMPOWERMENT PROJECT, *supra* note 156, at 8.

185. *Id.* at 9, 19.

186. *Id.* at 31.

187. *Id.* at 47.

188. *See* DANK ET AL., *supra* note 18, at 71–76.

189. *Id.* at 7.

190. *Id.* at 71–72.

need put forth that advocates often overlook—helping exploited youth access public benefits is an important step in meeting basic necessities.¹⁹¹

Another strong example of a comprehensive and community-based framework is used by INCITE!, a national organization of radical feminists of color,¹⁹² which has stressed the importance of developing strategies promoting safety within communities of color without overrelying on law enforcement. INCITE! recognizes that prison expansion does not prevent violence and collective community interventions are key.¹⁹³ Consequently, it continuously advocates for community accountability by affirming values and principles, resisting external oppression, and supporting marginalized members of our communities.¹⁹⁴

INCITE! has noted the disconnect between antiviolence and antiprison activists and movements—a disconnect that has arguably led to the marginalization of women of color whose issues intersect with both of these movements.¹⁹⁵ A source has argued, “[t]o live violence free-lives, we must develop holistic strategies for addressing violence that speak to the intersection of all forms of oppression.”¹⁹⁶ Thus, addressing the needs of youth involved in the sex trade requires a holistic and fearless strategy because

[w]e have been taught to trust the prisons as a simple solution to complex social problems. When we realize that the prison system is not only an ineffective tool to end rape and domestic violence, but actually increases violence in our communities, we can sometimes feel powerless. But we are not powerless and we are not alone. We have vital resources in our families, our communities, and our friendships to create grassroots strategies for safety and accountability . . . we can build our capacity to create safer, more supportive, and more loving communities.¹⁹⁷

Locating support services and interventions within impacted communities helps to generate community accountability measures rooted in empowerment and healing. Finding interventions outside of prosecution and incarceration does not mean traffickers and buyers are not held accountable; rather, it means less emphasis is placed on policing mechanisms that harm communities as a whole.

191. *Id.* at 76.

192. *Who Is INCITE!?*, INCITE!, <http://incite-national.org/home> (last visited July 31, 2015).

193. See Beth Richie, *Race, Class, Gender, & Prisons*, INCITE!, <http://incite-national.org/page/race-class-gender-prisons> (last visited May 11, 2015).

194. See *INCITE! Critical Resistance Statement*, INCITE!, http://www.incite-national.org/sites/default/files/incite_files/resource_docs/5848_incite-cr-statement.pdf (last visited May 11, 2015).

195. *Id.*

196. *INCITE! Critical Resistance Statement*, *supra* note 194.

197. *Making Connections*, INCITE!, http://www.incite-national.org/sites/default/files/incite_files/resource_docs/9261_anti-prisonbrochure.pdf (last visited May 11, 2015).

The vulnerabilities of Black girls expose the limitations of the dominant antitrafficking frame. Without comprehensive support, the needs of minors in the sex trade are not met. A racial analysis is crucial in the development of harm reduction services and alternatives to sex work in addition to interventions that counter trauma, which include addressing violence, poverty, and overbroad criminal justice responses.

CONCLUSION

The victim label elicits legal protections and access to social services. In the context of CSEC, advocates and the TVPA assert that all youth are victims, yet in practice, marginalized youth are not granted necessary and comprehensive support reflective of their various needs. Black girls are particularly vulnerable due to stereotyping and their disproportionate representation in the juvenile justice system for prostitution offenses. In order to provide Black girls, and other marginalized youth, with the support they deserve, legal interventions must acknowledge: (1) the racial disparities in the prosecution of prostitution offenses; (2) the ways in which the juvenile justice system interacts with Black girls; (3) the social and economic pathways leading to youth involvement in sex work; and (4) the necessity of investing substantial resources in low-income communities. Evoking sensationalized narratives furthers stigma ascribed to youth on account of race and/or pathway into sexual exchange. What constitutes trafficking for adults is contested—and the same is true for minors. The dominant narrative of CSEC, racial stereotypes, and discretion within criminal systems complicate the victim label ascribed to minors in the TVPA. Services based upon assumed narratives constrain youth access to responsive and comprehensive support. Narrow interventions premised on victim status not only produce adverse effects for youth but also for communities as a whole. Therefore, intersectional strategies are needed to challenge structural inequities and provide all youth with services and alternatives.