

How Anti-Sex Trafficking Efforts Should Align With Criminal Justice Reform

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ABSTRACT

Current law enforcement practices—including efforts to address sex trafficking—disproportionately harm Black people. This Article proposes that front-end criminal justice reforms to reduce the criminalization of poverty, reform racially biased police practices, and increase police accountability could mitigate the disparate impact that policing has on Black individuals being sex trafficked. Aligning anti-sex trafficking efforts with criminal justice reform would prioritize the prevention of sex trafficking as well as the protection of people who experience trafficking, while seeking to prosecute traffickers with less collateral harm to Black individuals.

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INTRODUCTION

Sex trafficking occurs when a trafficker uses force, fraud, or coercion to induce another individual to perform a commercial sex act.1 To obtain maximum profit with minimal effort, traffickers often seek out individuals who are most vulnerable to coercion. The same factors that make individuals susceptible to this coercion—being young, poor, Black or brown, female, LGBTQ, among other factors2—also make individuals more likely to encounter police intervention, criminalization, and in rare but egregious cases, sexual misconduct by officers. Police intervention increases the likelihood of an individual receiving a criminal record or being incarcerated, particularly for Black individuals,3 which, in turn, increases an individual’s likelihood of being trafficked.4

1. 18 U.S.C. § 1591 (2000). Sex trafficking also occurs when a minor performs a commercial sex act, regardless of whether they do so because of force, fraud, or coercion. See id.
2. See Human Rights Project for Girls, Domestic Child Sex Trafficking and African American Girls, RIGHTS4GIRLS (Feb. 2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/African-American-Girls-and-Trafficking.pdf [https://perma.cc/Z7XB-9P72].
3. See e.g., Colleen Walsh, Solving Racial Disparities in Policing, THE HARVARD GAZETTE (Feb. 23, 2021), https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing [https://perma.cc/3RPF-WL64] (“Rooted in slavery, racial disparities in policing and police violence, they say, are sustained by systemic exclusion and discrimination, and fueled by implicit and explicit bias.”). Importantly, policing has a disparate impact on all people of color—not just Black individuals. However, to recognize different demographics’ unique experiences of sex trafficking and interacting with law enforcement, this Article focuses on Black individuals.
4. KYLEIGH FEEHS & ALYSSA CURRIER WHEELER, 2020 FEDERAL HUMAN TRAFFICKING REPORT, HUMAN TRAFFICKING INSTITUTE 28 (Lindsey Roberson, ed., 2021) https://www.traffickinginstitute.org/wp-content/uploads/2021/06/2020-Federal-Human-Trafficking-Report-Low-Res.pdf [https://perma.cc/EE9B-DJNG] (explaining that in 2020, prior incarceration was one of the most common vulnerabilities of trafficking victims); see

Despite this vicious cycle, policing is a central component of the United States' anti-sex trafficking⁵ efforts.⁶ Advocates have recognized the controversy of tasking law enforcement with the identification of individuals being trafficked.⁷ However, few scholars have recognized how criminal justice reform could mitigate the disparate impact that police-led anti-sex trafficking efforts have on Black individuals at risk of and being trafficked.⁸ This Article does just that.

This Article first provides an overview of current anti-sex trafficking efforts and law enforcement operations, of related criminal justice reform, and of existing literature about the intersection of anti-sex trafficking efforts and criminal justice reform. Next, this Article discusses three front-end criminal justice reforms: reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability. This Article explains how each of these reforms could reduce the disparate negative impact that police-led anti-trafficking efforts cause Black individuals, particularly women and girls. Ultimately, this Article concludes that aligning current anti-sex trafficking efforts with broader

Sasha Hulseley, Kshitiz Karki, Olivia Reyes & Alyssa Scott, *Survivors Deserve a Clean Slate*, THE GENDER POLICY REPORT (Jan. 12, 2021), <https://genderpolicyreport.umn.edu/survivors-deserve-a-clean-slate/> [<https://perma.cc/RU78-7AG5>] (arguing that without expungement, people who experienced trafficking with criminal records “may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive”); see also Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 120 (2020) (noting that collateral consequences of criminal records, such as employment, housing, and education restrictions, “further the cycle of the criminalization of poverty”).

5. This Article focuses exclusively on anti-sex trafficking efforts, but anti-labor trafficking efforts are equally important and would also likely benefit from reforms to reduce collateral harm to people being trafficked.
6. See Amy Farrell, Jack McDevitt, & Stephanie Fahy, *Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report*, NORTHEASTERN UNIV. INST. OF RACE & J. (Dec. 2008), <https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf> [<https://perma.cc/TD7P-8VW6>] (noting that the United States government “has prioritized human trafficking prosecutions and expects local law enforcement to become the ‘eyes and ears for recognizing, uncovering and responding to circumstances that may...turn out to be a human trafficking case’”); see also U.S. Dep’t of State, *3Ps: Prosecution, Protection and Prevention*, U.S. DEP’T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention> (last visited Dec. 2, 2021) [<https://perma.cc/N8C5-DSEE>] (explaining that prosecution is part of “the fundamental framework used around the world to combat human trafficking”).
7. See e.g., Sabrina Balgamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN ST. L. REV. 174 (2017). (discussing the “unintentional harms of law enforcement anti-trafficking initiatives” and “the need for alternative policies that prioritize survivor agency and autonomy”); Kate D’Adamo, *Can Anti-Trafficking Be Rescued?* REFRAME HEALTH & JUSTICE (June 17, 2020), <https://reframehealthandjustice.medium.com/can-anti-trafficking-be-rescued-5688c3221173> (recognizing that “[n]either healing from victimization nor fighting exploitation inherently involves law enforcement”); HANNAH GARRY & MAURA REINBRECHT, *OVER-POLICING SEX TRAFFICKING: HOW U.S. LAW ENFORCEMENT SHOULD REFORM OPERATIONS*, UNIV. OF SOUTHERN CAL. GOULD SCHOOL OF LAW INT’L HUMAN RIGHTS CLINIC, 52 (2021) (recommending that law enforcement “[d]rastically limit the use of operations to a few specific circumstances while supporting community and public health approaches to identify victims and traffickers outside of the criminal justice system”).
8. Abigail Swenstein and Kate Mogulescu are two scholars who have recognized that criminal justice reform should be incorporated into anti-sex trafficking efforts. Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform*, 6 ANTI TRAFFICKING REV. 118 (2016).

criminal justice reform could reduce this disparate negative impact.

I. BACKGROUND

A. Current Anti-Sex Trafficking Efforts: Law Enforcement Operations

In 2000, the Trafficking Victims Protection Act (TVPA) made both forced labor and sex trafficking a federal crime in the United States.⁹ Consistent with the international community’s anti-trafficking efforts,¹⁰ the TVPA follows the “3P Paradigm” to protect people being trafficked,¹¹ prosecute traffickers, and prevent trafficking.¹² While state and federal government have recently invested in prevention efforts and enhanced protections for people who experience trafficking,¹³ human rights advocates have long criticized the United States’ anti-trafficking approach as focusing too heavily on “arrest[ing], prosecut[ing] and punish[ing] traffickers,” sometimes at the expense of protecting people who have been trafficked¹⁴ or preventing trafficking before it occurs.¹⁵ For example, the

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9. Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. §1589-91 (2000).
 10. Namely, the TVPA’s goals mirror those of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Palermo Protocol”). See U.S. Dep’t of State, *supra* note 6.
 11. Individuals who are and were trafficked are often referred to as “victims” or “survivors,” respectively. To recognize that the experience of sex trafficking is something that happens to individuals but does not constitute their entire identity, this Article refers to these demographics as “people being trafficked” and “people who experienced trafficking.”
 12. *Id.*
 13. See U.S. Dep’t of Justice, *Justice Department Awards Nearly \$101 Million to Combat Human Trafficking*, U.S. DEP’T OF JUSTICE (Sept. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-awards-nearly-101-million-combat-human-trafficking> [https://perma.cc/2DT3-5CMP] (outlining the funds dedicated to protection and prevention efforts). For example, the United States Department of Justice’s (DOJ) Civil Rights Division created the Human Trafficking Prosecution Unit (HTPU), which both increased prosecution of sex trafficking and forced labor and enhanced efforts to identify adults—not just minors—who are being trafficked. Additionally, HTPU enumerates the rights of and provides resources—such as immigration relief—to people who experience trafficking as part of its efforts to protect this population while simultaneously prosecuting their traffickers. See U.S. Dep’t of Justice, *Human Trafficking Prosecution Unit (HTPU)*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> (last visited Dec. 27, 2022) [https://perma.cc/8Z83-6XTS] (noting that all victims of federal crimes, including human trafficking, have the right to be reasonably protected from the accused and the right to be treated with fairness and respect for their dignity and privacy.)
 14. Mike Dottridge, *Introduction to Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, JUSTICE GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN 1 (2007) http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf [https://perma.cc/MZ9T-KVTB].
 15. See Jonathan Todres, *Taking Prevention Seriously: Developing A Comprehensive Response to Child Trafficking and Sexual Exploitation*, 43 VAND. J. TRANSNAT’L L. 1, 4 (2010) (“Instead of choosing prevention as the starting point for developing an effective response to child

2000 TVPA only provided immigration protection to foreign individuals being trafficked if they cooperated with law enforcement to charge their trafficker.¹⁶ This contingency failed to recognize many trafficked individuals' fear of both law enforcement and opposing their traffickers. While this contingency no longer exists, anti-sex trafficking efforts' emphasis on prosecution remains.

To illustrate, law enforcement "operations"—often known as "raids" or "stings"—are one of the government's primary tools for combating sex trafficking.¹⁷ In theory, operations aim to identify not just traffickers, but also individuals being trafficked.¹⁸ However, law enforcement participating in operations receive inconsistent training about how to identify individuals being trafficked and interview such individuals without exacerbating their trauma.¹⁹

Accordingly, some critics question the appropriateness of law enforcement's central role in identifying people being sex trafficked, in part due to its disparate harm to Black individuals.²⁰ Section III discusses these disparate impacts in more detail in conjunction with the following criminal justice reforms.

B. Front-End Criminal Justice Reforms

The United States' criminal justice system incarcerates people at a higher rate than any other country in the world.²¹ Due to racial disparities in poverty,

trafficking and commercial sexual exploitation, to date most governments have paid the least attention to what is actually the end goal. In fact, in many locales, prevention measures have been nonexistent.”).

16. See Victims of Trafficking and Violence Protection Act of 2000 §1589-91, *supra* note 9. Individuals could also qualify for relief based on age, physical inability, or psychological trauma. *See id.*
17. See Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, 1 ANTI-TRAFFICKING REV. 134, 136 (2012) (“Law enforcement raids have served as the US government’s primary means of identifying victims of trafficking in persons.”).
18. Garry & Reinbrecht, *supra* note 7. Such federal operations include the Innocence Lost National Initiative and Operation Independence Day (formerly Operation Cross Country); *see also* U.S. Dep’t of Justice, *Innocence Lost National Initiative and Operation Independence Day 2019*, THE U.S. DEP’T OF JUSTICE (Aug. 6, 2019) <https://www.justice.gov/opa/pr/innocence-lost-national-initiative-and-operation-independence-day-2019> [<https://perma.cc/6RXL-6LFY>].
19. See Garry & Reinbrecht, *supra* note 7, at 13 (“[A] 2020 study that evaluated 541 incident reports in San Francisco that involved someone selling sex found that only 17% of those reports mentioned screening for human trafficking.”)
20. See *e.g.*, Swenstein & Mogulescu, *supra* note 8, at 120 (explaining that individuals who experience sex trafficking “do not seek rescue at the hands of law enforcement,” and how a law enforcement approach to the issue of human trafficking negatively impacts individual clients and larger anti-trafficking efforts); Annie Gilbertson, Aaron Mendelson, & Angela Caputo, *Collateral Damage: How LA’s Fight Against Sex Trafficking is Hurting Vulnerable Women*, LAIST (Aug. 7, 2019), <https://projects.laist.com/2019/collateral-damage/> [<https://perma.cc/W6Z2-AFTT>] (citing various critics of Los Angeles Police Department’s (LAPD) anti-sex trafficking efforts, and noting “[w]hile black women make up around 9% of the city’s female population, they account for nearly 65% of the LAPD’s female prostitution arrests.”); Garry & Reinbrecht, *supra* note 7, at 2 (critiquing law enforcement anti-sex trafficking efforts both for ineffectively identifying victims and traffickers and disproportionately arresting Black women and minors.)
21. See *e.g.*, *Criminal Justice Reform*, EQUAL JUSTICE INITIATIVE <https://eji.org/criminal-justice-reform/> (last visited Nov. 16, 2021) [<https://perma.cc/GD85-A84A>]; Emily Widra & Tiana

policing, and arrests, among other aspects of the criminal justice system, mass incarceration in the United States disproportionately impacts Black individuals.²²

Black individuals are more likely to experience poverty,²³ and people experiencing poverty are more likely to be “fined, arrested, and even incarcerated for minor offenses than other Americans.”²⁴ Black individuals are also subject to “interventionist police practices” and targeted policing that results in a disproportionate number of arrests.²⁵ Moreover, lack of police accountability, in part due to the blue wall of silence,²⁶ exacerbates racially biased police practices.²⁷ For example, Black women are particularly vulnerable to police sexual violence

Herring, *States of Incarceration: The Global Context*, PRISON POLICY INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/MZR6-ALT6>]

22. See *Criminal Justice Reform*, *supra* note 21.

23. See e.g., John Creamer, Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/SBU6-2U9M>] (Finding that, “[i]n 2019 . . . Blacks represented 13.2% of the total population in the United States, but 23.8% of the poverty population.”).

24. See e.g., Karen Dolan & Jodi L. Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, THE INST. FOR POL’Y STUD 6 (Mar. 18, 2015) <https://ipsdc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [<https://perma.cc/7LQ9-Z7TK>]; *Dispelling Myths About Poverty*, EQUAL JUSTICE UNDER LAW, <https://equaljusticeunderlaw.org/poverty-myths> (last visited Nov. 19, 2021) [<https://perma.cc/N5C8-HU88>]; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (Jul. 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/BM7Q-MXBW>] (Finding that, “in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is forty-one percent less than non-incarcerated people of similar ages.”).

25. See e.g., RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN MERKL, LEILY ARZY HERNANDEZ STROUD, TAYLOR KING, JACKIE FIELDING & ALIA NAHRIA, BRENNAN CENTER FOR JUSTICE, A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM 6, (2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform> [<https://perma.cc/2LHK-U9FM>]; *Criminal Justice Reform*, SOUTHERN POVERTY LAW CENTER <https://www.splcenter.org/issues/mass-incarceration> (last visited Nov. 17, 2021) [<https://perma.cc/X6CY-L58J>].

26. The blue wall of silence is defined as an implicit agreement between law enforcement officers to keep quiet about each other’s misconduct, to protect one another from disciplinary action, and to maintain a culture where “secrecy is promoted and rewarded.” *The Blue Wall of Silence Perpetuates Racist Policing, Wrongful Convictions*, MONTANA INNOCENCE PROJECT <https://mtinnocenceproject.org/the-blue-wall-of-silence-perpetuates-racist-policing-wrongful-convictions/> (last visited March 17, 2023). The blue wall of silence is discussed in more detail in Section III(c), Increasing Police Accountability.

27. See, e.g., Anastasia Cassisi, *Sexual Misconduct by Law Enforcement: A New Meaning to Stop and Frisk?*, 33 J. CIV. RTS & ECON. DEV. 141, 155 (2019) (noting that “[t]he blue wall of silence further exacerbates the issue of sexual misconduct by officers...because [it] leads to cover-ups and cultivates a ‘culture of American policing [that] does nothing to encourage the good apples from policing the bad ones’”). Sexual misconduct by officers is part of a larger trend of racially biased policing, and “has consistently been part of the arsenal of oppression and policing and repression against communities of color.” *Id.* Because the blue wall of silence exacerbates the issue of sexual misconduct by police officers, and sexual misconduct is part of racially biased policing, it follows that the blue wall of silence exacerbates racially biased police practices.

due to inadequate legal protections,²⁸ increased contact with law enforcement due to over-policing,²⁹ and pejorative stereotypes that have endured from slavery.³⁰ Yet not all law enforcement departments clearly prohibit sexual misconduct, and departments often miscategorize³¹ and minimize such misconduct.³²

Accordingly, central goals of front-end criminal justice reform in the United States include reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability.³³ In Section III, these reforms are discussed in more detail as remedial efforts to the shortcomings of current police-led anti-sex trafficking efforts.

C. Literature Review: The Intersection of Anti-Sex Trafficking and Criminal Justice Reform

Some scholars have argued the anti-trafficking movement should disentangle itself from law enforcement, as did the anti-intimate partner violence

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28. Historically, sexual violence against Black women was not prohibited by law. Even after slavery was abolished, laws failed to adequately protect Black women from sexual violence and pejorative stereotypes about Black women persisted. Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM & MARY J. WOMEN & L. 39, 44-47 (2017).
 29. Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651(2016).
 30. Jacobs, *supra* note 28, at 46-47 (explaining that stereotypes about Black women that developed during slavery include that Black women are promiscuous and immoral, and therefore responsible for the sexual violence against them; that Black women are not credible, and their accusations therefore not believable; and that Black women are aggressive, and therefore are mutual combatants rather than victims).
 31. Nancy Phillips & Craig R. McCoy, *Extorting Sex with a Badge*, THE PHILADELPHIA INQUIRER (Mar. 29, 2007), https://www.inquirer.com/philly/news/special_packages/inquirer/Extorting_sex_with_a_badge.html [<https://perma.cc/6CUR-3H2U>] (explaining that law enforcement departments “often lump sex-abuse allegations into such categories as ‘conduct unbecoming’”); Isodoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, THE CRIME REPORT (Mar. 12, 2020), <https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/> [<https://perma.cc/FWW8-965R>] (noting that “police agencies . . . wrongly categoriz[e] reports of abuse as discourtesy, improper search, or unprofessional conduct in an attempt to diminish their severity and impact”).
 32. See Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, ALJAZEERA AMERICA (Jan. 19, 2016), <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html> [<https://perma.cc/R9HW-A8EP>] (quoting Andrea Ritchie on police internal affair bureau’s partiality to their fellow officers, whereas investigators are tough on victims); see also Cassisi, *supra* note 27, at 154-55 (describing how Oakland Police Department minimized and improperly investigated allegations of police sexual misconduct (“PSM”)).
 33. See *Solutions*, ACLU, <https://www.aclu.org/other/solutions> (last visited Dec. 3, 2021) [<https://perma.cc/H2BK-MCFV>] (discussing front-end criminal law reforms such as “reducing the number of people who needlessly enter prison in the first place” and “[e]liminat[ing] incarceration as a penalty for certain classes of low-level, non-violent offenses - especially when these offenses are the result of mental illness, drug addiction or are first-time offenses”); see also *ACLU Criminal Law Reform Project*, ACLU, <https://www.aclu.org/other/aclu-criminal-law-reform-project> (last visited Dec. 3, 2021) [<https://perma.cc/Q46P-SE5C>] (discussing front-end criminal law reforms such as “reforming unconstitutional and racially biased police practice”).

movement;³⁴ they have specifically discussed the value of special trafficking³⁵ and problem-solving courts.³⁶ However, only a few scholars have explicitly discussed aligning anti-sex trafficking efforts with criminal justice reform.

Abigail Swenstein and Kate Mogulescu, New York City attorneys representing people who experienced trafficking and people arrested for prostitution, advocate for aligning anti-trafficking efforts with criminal justice reform.³⁷ More specifically, they argue that arresting and prosecuting in the name of anti-trafficking is contrary to “efforts to challenge racially motivated policing, police violence, [and] mass incarceration.”³⁸ Swenstein and Mogulescu critique the “prosecution-based model” of anti-trafficking efforts for ignoring what they have found trafficking survivors really want, which is not “rescue” by the criminal justice system, but instead access to affordable housing and economic and educational opportunities.³⁹

Swenstein and Mogulescu analogize the “war on trafficking” to the war on drugs, claiming both focus on the arrest of low-level offenders: the war on drugs targeted low-level drug offenders, and the war on trafficking similarly targets individuals in the commercial sex industry, many of whom are trafficked into sex work.⁴⁰ Arrests of sex workers, like arrests of people possessing small amounts of controlled substances, results in a disproportionate number of Black people entering the criminal justice system.⁴¹

Moreover, Professor Sabrina Balgamwalla at the University of North Dakota critiques state intervention policies that deny people who experienced trafficking their autonomy and sometimes their safety.⁴² She explains that state interventions that were intended to protect victims of intimate partner violence, such as mandatory arrest and prosecution of their abusers, “potentially alienat[e] women and men who wish to live free of violence, but on their own terms.”⁴³ Like people experiencing intimate partner violence, Balgamwalla argues, people who experienced trafficking do not always desire a criminal justice response to their abuse, and state interventions that require them to cooperate with law enforcement officers or the court system denies these individuals their agency.⁴⁴

34. See, e.g., Balgamwalla, *supra* note 7.

35. See, e.g., Anette Sikka, *Trafficking in Persons: How America Exploited the Narrative of Exploitation*, 55 TEX. INT’L L.J. 1, 33 (2019) (Noting that “[s]pecial trafficking courts have further contributed to the creation of trafficking, generating victims and the numbers that will be counted as part of the anti-trafficking effort.”).

36. See Julia Garrison, *Unfair and Ineffective Punishment: Using Problem-Solving Methodologies to Reduce the Incarceration of Juvenile Victims of Human Trafficking*, 24 GEO. J. ON POVERTY L. & POL’Y 441 (2017).

37. Swenstein & Mogulescu, *supra* note 8, at 122.

38. *Id.*

39. *Id.*

40. *Id.*

41. See *id.* at 120.

42. Balgamwalla, *supra* note 7, at 171.

43. *Id.* at 173.

44. *Id.* at 174.

Other scholars have written on problem-solving courts and special trafficking courts in the context of the anti-trafficking movement and criminal justice reform. For example, Julia Garrison argues that “the D.C. Superior Court should expand upon the problem-solving infrastructure to include a specialty court and program for juvenile victims of human trafficking.”⁴⁵ Anette Sikka critiques the efficacy of special trafficking courts, noting that the existence of such courts does not prevent the initial arrest of people involved in commercial sex, and they “still engage victims in criminal justice systems, and problems inherent to those systems spill over onto individuals before that court.”⁴⁶

In sum, while the prevailing view in the anti-trafficking field domestically and abroad is that prosecution is one of the “3Ps” for combating trafficking, some anti-trafficking scholars advocate for disentangling anti-sex trafficking efforts from the criminal justice system. Yet there is limited literature about how doing so aligns with broader criminal justice reform, specifically in regard to reducing the criminalization of poverty, racialized policing and police accountability. This Article expands on these observations by offering specific recommendations about how criminal justice reform could improve current anti-trafficking efforts.

II. DISCUSSION: HOW ANTI-SEX TRAFFICKING EFFORTS SHOULD ALIGN WITH CRIMINAL JUSTICE REFORM

This section explains how criminal justice reform—specifically reducing the criminalization of poverty, reforming racially biased police practices, and increasing police accountability—should inform anti-sex trafficking prevention and protection efforts. Current anti-sex trafficking efforts, which rely heavily on law enforcement operations, have a disparate impact on Black individuals for the following three reasons. First, Black individuals are at greater risk of being criminalized for poverty, which further exacerbates their risk of being sex trafficked,⁴⁷ and police-led trafficking efforts address sex trafficking after it occurs, failing to invest in preventative measures to lower risks of sex trafficking. Second, Black individuals, especially girls, face a heightened likelihood of criminalization in the course of anti-sex trafficking efforts.⁴⁸ Third, Black individuals are more likely to be subject to police misconduct, especially sexual

45. Garrison, *supra* note 36, at 442.

46. Sikka, *supra* note 35, at 33.

47. See Hulsey, Karki, Reyes, & Scott, *supra* note 4 (arguing that without expungement, people who experience trafficking with criminal records “navigate the world with a harmful criminal record and may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive”); see also Edelman, *supra* note 4, at 120 (noting that the collateral consequences of criminal records, such as employment, housing, and education restrictions, “further the cycle of the criminalization of poverty”); Feehs & Currier Wheeler, *supra* note 4, at 28 (explaining that in 2020, prior incarceration was one of the most common vulnerabilities of trafficking victims).

48. See Kelle Barrick, Meg Parnichelli, Barrot Lmabdin, Minh Dang, Alexandra Lutnick, *Law Enforcement Identification of Potential Trafficking Victims*, 44 J. CRIME & JUST. 1, 11 (2021).

misconduct, during anti-sex trafficking operations.⁴⁹ This section concludes that aligning criminal justice reform with anti-trafficking efforts could mitigate these disparate impacts.

A. Reducing the Criminalization of Poverty

1. The Criminalization of Poverty via the School-to-Prison Pipeline

In the United States, people experiencing poverty are more likely to come into contact with the criminal justice system.⁵⁰ Poverty is criminalized in a number of ways, such as vagrancy and loitering laws; the incarceration of individuals for the inability to pay fines and fees for traffic violations and misdemeanors;⁵¹ post-incarceration barriers to employment; and excessive punishment of poor school children that funnels them into the school-to-prison pipeline.⁵²

The school-to-prison pipeline illustrates how poverty puts individuals, particularly Black minors, at increased risk of coming in contact with the criminal justice system.⁵³ The school-to-prison pipeline is defined as harsh disciplinary practices and the presence of law enforcement officers in schools that result in subjective and severe punishments for minor infractions.⁵⁴ Harsh disciplinary practices mirror those of the “tough on crime” approach, and have similar disparate impacts on racial minorities—Black and other minority students are more likely to attend schools with high poverty rates, which are more likely to employ law enforcement officers that criminalize students and increase their

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49. See e.g., Melissa Ditmore, *The Use of Raids to Fight Trafficking in Person*, SEX WORKERS PROJECT (2009), <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf> [https://perma.cc/AMC3-F5TL] (“Raids create circumstances facilitating police misconduct, including sexual misconduct, against trafficked persons.”); see also Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 157 (2016) (“[W]omen of color are particularly vulnerable to sexual abuse at the hands of law enforcement, and other targeted populations include transgender and gender-nonconforming people”); Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 1187 (2016).
50. See e.g., Dolan & Carr, *supra* note 24 (“Poor people, especially people of color, face a far greater risk of being fined, arrested, and even incarcerated for minor offenses than other Americans”); *Dispelling Myths About Poverty*, *supra* note 24; Rabuy & Kopf, *supra* note 24 (“[I]n 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages”).
51. The Opportunity Agenda, *Eliminate the Criminalization of Poverty*, THE OPPORTUNITY AGENDAS, <https://transformingthesystem.org/criminal-justice-policy-solutions/eliminating-the-criminalization-of-poverty/> (last visited Dec. 4, 2021) [https://perma.cc/3WJZ-6PHR].
52. Dolan & Carr, *supra* note 24, at 7.
53. See Edelman, *supra* note 4, at 117.
54. KAREN DOLAN & EBONY SLAUGHTER-JOHNSON, STUDENTS UNDER SIEGE: HOW THE SCHOOL-TO-PRISON PIPELINE, POVERTY AND RACISM ENDANGER OUR SCHOOL CHILDREN, INSTITUTE FOR POLICY STUDIES 5 (2018), <https://ips-dc.org/wp-content/uploads/2018/08/KAREN-REPORT-2.pdf> [https://perma.cc/C5MP-A65T].

likelihood of entering the juvenile justice system.⁵⁵ In this way, among others, the criminalization of poverty directly contributes to racial disparities in incarceration.⁵⁶

2. Poverty and Disproportionate Risk of Being Sex Trafficked

Mitigating the criminalization of poverty would not only reduce mass incarceration and racial disparities in the United States' criminal justice system but would also reduce the vulnerabilities that increase an individual's risk of being sex trafficked. Some factors that make individuals vulnerable to sex trafficking, in addition to being young and non-male,⁵⁷ include poverty, family instability, being a runaway youth, experiencing houselessness, experiencing sexual or physical abuse, and involvement with child protective services (also known as the family policing system⁵⁸) or foster care.⁵⁹

Statistics on these vulnerability factors make clear why Black individuals, and especially minors, are disproportionately at risk of being sex trafficked. In 2019, thirty-one percent of Black children lived in poverty, compared to ten percent of white children.⁶⁰ Black people represent thirteen percent of the U.S. population, yet in 2020, thirty-nine percent of people experiencing houselessness in the United States were Black, and over fifty percent of houseless families with children were Black.⁶¹ Nearly twenty-three percent of children in the foster care system in 2018 were Black.⁶² In 2015, twenty-one percent of child abuse victims

55. *See id.* at 5-7.

56. *See* Bruce Western, *Race, Poverty, and Justice Reform*, 16 DU BOIS REV. 177, 178 (2019); Wendy Sawyer and Pete Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023).

57. The trans population, and especially trans women, are at increased risk of being sex trafficked. *See Unique Obstacles Put Transgender People at Risk of Trafficking*, POLARIS PROJECT (Mar. 10, 2017), <https://polarisproject.org/blog/2017/03/unique-obstacles-put-transgender-people-at-risk-of-trafficking/> [<https://perma.cc/5C3Z-9NEJ>].

58. *See generally* Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CAL. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4219985> [<https://perma.cc/3YMV-BC2C>].

59. Human Rights Project for Girls, *supra* note 2; *see also* Feehs & Currier Wheeler, *supra* note 4, at 28 (“In 2020, the top victim vulnerabilities in active cases were substance dependency (38%, 139), having run away from home (28%, 100), undocumented immigration status (17%, 63), houselessness (10%, 37), being in the foster care system (10%, 35), having been previously trafficked (8%, 28), limited English language skills (6%, 22), financial debt (4%, 15), intellectual disabilities (4%, 14), and prior incarceration (2%, 6)”).

60. *Children in Poverty by Race and Ethnicity in the United States*, THE ANNIE E. CASEY FOUNDATION KIDS COUNT DATA CENTER, <https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323> (last visited Nov. 17, 2021) [<https://perma.cc/Z562-HWKU>].

61. *Homelessness and Racial Disparities*, NATIONAL ALLIANCE TO END HOMELESSNESS (Oct. 2020), <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/> [<https://perma.cc/Z562-HWKU>].

62. *Black Children Continue to be Disproportionately Represented in Foster Care*, THE ANNIE E. CASEY FOUNDATION KIDS COUNT DATA CENTER (Apr. 13, 2020), <https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323> (last visited Nov. 17, 2021) [<https://perma.cc/W9TU-WGYF>].

were Black,⁶³ and Black women, girls, and nonbinary individuals are hyper-vulnerable to abuse.⁶⁴

Individuals vulnerable to sex trafficking frequently live at the intersection of multiple marginalized identities.⁶⁵ For example, members of the LGBTQ community are more likely to experience factors that make them vulnerable to sex trafficking, including economic instability,⁶⁶ lack of family support, and houselessness.⁶⁷ LGBTQ youth represent forty percent of houseless youth and are more than seven times more likely than their heterosexual and cisgender counterparts to experience sexual violence.⁶⁸ Traffickers, like other perpetrators of sexual violence, target vulnerable individuals, such as LGBTQ youth who lack adequate community support.⁶⁹ The inference follows that Black LGBTQ youth are at a greater risk of being sex trafficked than straight and cisgender Black youth.

The criminalization of poverty creates a vicious cycle.⁷⁰ Black individuals are more likely to experience risk factors such as poverty and houselessness and are also more likely to be criminalized due to these risk factors.⁷¹ People being sex trafficked who are erroneously charged with prostitution may resort to premature guilty pleas and stigmatic criminal convictions to avoid jail time.⁷² Moreover, individuals who are incarcerated for low-level offenses, such as prostitution, often spend more time in jail awaiting their court date than those with the resources to make bail or show stable housing that would qualify them for pre-trial release.⁷³

63. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2015, <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment> (last visited Nov. 17, 2021) [<https://perma.cc/R8MK-G65K>].

64. Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non> [<https://perma.cc/M6GA-WEU6>] (stating that twenty-two percent of Black women in the United States have experienced rape, Black women are killed at a higher rate than any other group of women, fifty-three percent of Black trans and non-binary individuals have experienced sexual violence and fifty-six percent have experienced domestic violence).

65. Kimberle Crenshaw coined the term “intersectionality” to describe the interaction between different aspects of identity which creates a wholly unique experience within systems and institutions. Kimberle 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 (1989).

66. *Sex Trafficking and LGBTQ Youth*, POLARIS PROJECT (2019), <https://polarisproject.org/wp-content/uploads/2019/09/LGBTQ-Sex-Trafficking.pdf> [<https://perma.cc/Y835-ULYV>].

67. J. Leigh Oshiro-Brantly, Frances Steele, Melissa Sontag Broudo, Crystal DeBoise, & Sahnah Lim, *Continuum of Exploitation: The Role of Inclusive Sexual Health Education in Preventing Human Trafficking of Minors*, 15 CHARLESTON L. REV. 585, 611-15 (2021).

68. Polaris Project, *supra* note 66.

69. See Edelman, *supra* note 4, at 120 (noting that collateral consequences of criminal records, such as employment, housing, and education restrictions, “further the cycle of the criminalization of poverty”).

70. *Id.*

71. Dolan & Carr, *supra* note 24, at 6.

72. See *id.*

73. See John Matthews II and Felipe Curiel, *Criminal Justice Debt Problems*, AMERICAN BAR ASSOCIATION (Nov. 30, 2019),

Criminal records and incarceration, in turn, exacerbate the vulnerabilities that put individuals at increased risk of being sex trafficked by restricting access to housing assistance, public benefits, and employment.⁷⁴ Additionally, some traffickers use criminal records to further coerce the individuals they are trafficking, for example by suggesting law enforcement officers are less likely to believe individuals with a criminal record.⁷⁵

3. Recommendations

Reducing the criminalization of poverty would protect individuals who are already vulnerable to being sex trafficked from criminal records and, therefore, further marginalization. Accordingly, anti-sex trafficking advocates should invest in resources to assist houseless Black and LGBTQ individuals; lobby against legislation that disproportionately impacts houseless and poor individuals; reform disciplinary policies that fuel the school-to-prison pipeline; and minimize collateral consequences of criminal records.

Local and state governments should invest in affordable housing and public health services, rather than the police, to help houseless people off the streets. In the meantime, law enforcement should receive training about how to interact with houseless communities, and particularly houseless Black and LGBTQ youth, to prevent profiling, harassment, and criminalization.⁷⁶ For example, police officers should provide resources, such as information about homeless shelters, food pantries, and affordable housing, rather than arresting houseless individuals, especially for life-sustaining behavior like sleeping or cooking outside. Training should address the differences between sexual orientation and gender identity, how to ask someone about and use correct pronouns, and how to investigate anti-LGBTQ hate crimes.⁷⁷ While training is a first step to changing how law enforcement treat and perceive houseless Black and LGBTQ youth, there must also be comprehensive institutional reform to mitigate the decades of law enforcement's criminalization of such individuals.

Advocates should also lobby against loitering and vagrancy laws that put houseless individuals in contact with the criminal justice system, and engage in litigation and legislative efforts to ensure enforcement of the Supreme Court's 1983 ruling in *Bearden v. Georgia*.⁷⁸ In *Bearden*, the Court held that a defendant

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/ [<https://perma.cc/6XQU-QHKK>].

74. See Hulsey, Karki, Reyes, & Scott, *supra* note 4.

75. K.B. White, *Impact of Arrest and Conviction Histories on Trafficking Survivors*, FREEDOM NETWORK USA (edited Dec. 6, 2021), <https://freedomnetworkusa.org/2021/11/10/impact-of-arrest-and-conviction-histories-on-trafficking-survivors/>.

76. *Eliminate the Criminalization of Poverty*, THE OPPORTUNITY AGENDA, <https://transformingthesystem.org/criminal-justice-policy-solutions/eliminating-the-criminalization-of-poverty/> (last visited Dec. 17, 2021) [<https://perma.cc/BM92-B2P2>].

77. See Finbarr Toesland, *Police Departments Across U.S. are Mandating LGBTQ Training*, NBC NEWS (Sept. 25, 2021), <https://www.nbcnews.com/nbc-out/out-news/police-departments-us-are-mandating-lgbtq-training-rcna2250> [<https://perma.cc/UD3U-VMST>].

78. *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

could not be incarcerated for failure to pay a fine, unless there was evidence the defendant “willfully” refused to pay, or if there were no alternative forms of punishment to adequately serve the State’s interests.⁷⁹ The Court failed to define “willful refusal,” however, and lower courts therefore informally and inconsistently assess defendants’ ability to pay.⁸⁰ For example, some courts consider defendants’ agreement to pay as part of a plea bargain an exception to *Bearden*.⁸¹ Other courts blatantly fail to assess defendant’s ability to pay.⁸² To address this, constitutional challenges could be brought to clarify the meaning of “willful refusal,” legislation could charge fees proportional to income, or fines and fees could be abolished all together.⁸³ At the very least, every state should eliminate fines and fees for minors, which have particularly devastating consequences, including bankruptcy and disqualification from student loans.⁸⁴

Dismantling the school-to-prison pipeline requires replacing specific disciplinary policies. Harsh disciplinary measures, such as suspensions, expulsions, and referrals to law enforcement, should be a last resort and for only the most serious offenses.⁸⁵ Specifically, schools should not rely on police officers, known as school resource officers (“SROs”), to patrol school grounds, as the presence of SROs increases the chances that students are referred to law enforcement for low-level offenses.⁸⁶ Schools should also eliminate zero-tolerance policies, which require schools to apply predetermined consequences like suspension or expulsion to offenses without considering the circumstances of each offense.⁸⁷

Harsh disciplinary measures should be replaced with evidence-based practices to maintain an appropriate learning environment.⁸⁸ Preventive measures against behavioral disruptions include training educators in classroom

79. *Id.*

80. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtor’s Prisons*, NPR (May 21, 2014) <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [https://perma.cc/CN7D-YZKU].

81. Ann K. Wagner, *The Conflict over Bearden v Georgia in State Courts: Plea-Bargaining Probation Terms and the Specter of Debtors’ Prison*, U. CHI. LEGAL F., 2010, at 386.

82. Olivia C. Jerjian, *The Debtors’ Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 251 (2017).

83. *See id.* at 266-67.

84. Michael Friedrich, *A Nationwide Campaign to End Juvenile Fines and Fees is Making Progress*, ARNOLD VENTURES, (Oct. 18, 2022), <https://www.arnoldventures.org/stories/a-nationwide-campaign-to-end-juvenile-fines-and-fees-is-making-progress> [https://perma.cc/5Y6C-SRTL] (“Five states — Delaware, Maryland, New Jersey, New Mexico, and Oregon — have abolished all fines and fees in the juvenile justice system. Another four — California, Colorado, Louisiana, and Nevada — have eliminated all juvenile court fees...Seven states — Indiana, New Hampshire, Oklahoma, Texas, Utah, Virginia, and Washington — have abolished or capped at least some fees for practices such as juvenile detention and diversion programs.”).

85. Jason Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313, 344 (2016).

86. *Id.* at 340.

87. *Id.* at 341-42.

88. *Id.* at 345-46.

management and a varied-instructional approach to engage a wider range of students,⁸⁹ as well as implementing social and emotional learning, which helps students identify, discuss, and manage their emotions and appropriately handle challenging interpersonal situations.⁹⁰ When behavioral disruptions do occur, schools should apply a restorative justice approach to misbehavior rather than a punitive one. Applying a restorative justice approach to discipline means that rather than being excluded from the school community via suspension or expulsion, misbehaving students would be invited to explore the causes of their misbehavior, repair the harm their misbehavior caused, and establish a plan to avoid future misbehavior.⁹¹ While there is evidence to support the restorative justice approach to discipline,⁹² both the federal and state governments should continue to invest in research and data collection to evaluate alternative disciplinary policies.⁹³

Moreover, people being trafficked sometimes acquire criminal records while they are being trafficked, and minimizing collateral consequences is therefore important to help them avoid re-victimization.⁹⁴ Therefore, anti-sex trafficking advocates should support the Trafficking Survivors Relief Act, which “provide[s] for the vacating of certain [federal] convictions and expungement of certain arrests of victims of human trafficking,”⁹⁵ as well as similar state laws. Advocates should also support programs that automatically vacate criminal records of individuals who do not reoffend within a certain time period, and “ban the box” legislation that prohibits employers from asking job applicants about their criminal history.⁹⁶

B. Reforming Racially Biased Policing Practices

1. History and the Sexual Abuse-to-Prison Pipeline

In the 1700s and 1800s, “slave patrols” became the primary policing

89. *Id.* at 347.

90. *Id.* at 350-51.

91. *Id.* at 354-55.

92. *Id.* at 355-57.

93. *See Dolan & Carr, supra* note 24, at 22.

94. *See Hulsey Karki, Reyes, & Scott, supra* note 4 (arguing that without expungement, people who experience trafficking with criminal records “navigate the world with a harmful criminal record and may experience exploitation as the only source of security. The current system keeps people in poverty or engaging in other criminal activity as a means to survive.”); *see also* Gilbertson, Mendelson, & Caputo, *supra* note 20 (explaining that the Coalition to Abolish Slavery and Trafficking (CAST) in Los Angeles “reports that half of its clients, who include sex and labor trafficking survivors, have criminal records for crimes committed while under the control of a trafficker. In one case, according to a CAST report, a client managed to escape her trafficker, only to be turned away by a housing program — because she had a criminal record.”).

95. Trafficking Survivors Relief Act of 2022, H.R. 8672, 117th Cong. (2022).

96. MICHAEL D. TANNER, POVERTY AND CRIMINAL JUSTICE REFORM, CATO INSTITUTE (Oct. 21, 2021), <https://www.cato.org/study/poverty-criminal-justice-reform>.

institution in the South and were used to preserve the institution of slavery.⁹⁷ These organizations evolved into centralized police departments,⁹⁸ and their legacies are evident in a number of modern policing practices. Examples include the disproportionate patrolling of Black neighborhoods; stopping, arresting, and charging Black individuals with low-level offenses; and using lethal force against Black individuals.⁹⁹

Enforcement of low-level offenses is one characteristic of the sexual abuse to prison pipeline.¹⁰⁰ The sexual abuse-to-prison pipeline describes the correlation between sexual abuse and entry into the criminal justice system,¹⁰¹ or in other words, when individuals are arrested for their “behavioral reaction to sexual abuse.”¹⁰² The sexual abuse-to-prison pipeline is fueled by the criminalization of “non-serious offenses that are rooted in the experience of abuse and trauma,” such as “misdemeanors, status offenses, outstanding warrants, and technical violations.”¹⁰³ Arresting individuals for reacting to sexual abuse disproportionately criminalizes Black individuals, because these individuals experience sexual—and physical—abuse at higher rates than their white counterparts.¹⁰⁴ Consistent with this inference, in the District of Columbia, Black girls represent fourteen percent of the population, but account for thirty-three

97. Gary Potter, *The History of Policing in the United States, Part 1*, EASTERN KENTUCKY UNIVERSITY ONLINE (June 25, 2013) <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/> [<https://perma.cc/6E2K-QWV3>] (“The genesis of the modern police organization in the South is the ‘Slave Patrol’... Following the Civil War, these vigilante-style organizations evolved in modern Southern police departments primarily as a means of controlling freed slaves who were now laborers working in an agricultural caste system, and enforcing ‘Jim Crow’ segregation laws, designed to deny freed slaves equal rights and access to the political system.”); Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (updated May 18, 2017) <https://time.com/4779112/police-history-origins/> [<https://perma.cc/4NBT-Q4N9>] (“In the South...the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system.”); Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing*, HUM. RTS., 2021, at 6 (noting that racism—and the history of slave patrols specifically—is officially acknowledged by the National Law Enforcement Officers Memorial Fund)).

98. *Id.*

99. See Walsh, *supra* note 3, at 5 (noting that “Black Americans are killed by police at twice the rate of white Americans, and Hispanic Americans are also killed by police at a disproportionate rate.”).

100. Malika Saada Saar, Rebecca Epstein, Lindsay Rosenthal, & Yasmin Vafa, *The Sexual Abuse to Prison Pipeline: The Girls’ Story*, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY 19 (2015) (explaining that “the leading cause of arrest for girls are minor offenses such as misdemeanors, status offenses, outstanding warrants, and technical violations.”).

101. Angela Myers, *What You Need to Know About the Sexual Abuse to Prison Pipeline*, NATIONAL ORGANIZATION FOR WOMEN (Jun. 22, 2016), <https://now.org/blog/what-you-need-to-know-about-the-sexual-abuse-to-prison-pipeline/> [<https://perma.cc/RAJ2-7VSE>] (explaining that an “overwhelming majority of girls in the juvenile justice system have experienced sexual abuse.”).

102. Emma Beavins, *The Link Between Systemic Racism and Human Trafficking*, DRESSEMBER, <https://www.dressember.org/blog/systemicracismandtrafficking> (last visited Dec. 18, 2021) [<https://perma.cc/BV2V-CJMP>].

103. Saar, Epstein, Rosenthal, & Vafa, *supra* note 100, at 7.

104. Finoh & Sankofa, *supra* note 64, at 1.

percent of girls in the juvenile justice system.¹⁰⁵

2. Disproportionate Risk of Arrest During Anti-Sex Trafficking Operations

The arrest of individuals being trafficked is part of the abuse-to-prison pipeline. Law enforcement agencies reportedly measure the success of anti-sex trafficking operations by the number of arrests made.¹⁰⁶ This focus on statistics incentivizes officers to make as many arrests as possible,¹⁰⁷ but instead of focusing on the arrest of traffickers specifically, law enforcement arrest—sometimes wrongfully¹⁰⁸—many sex workers and people being sex trafficked, a disproportionate number of whom are Black.¹⁰⁹

Sex work, as distinguished from sex trafficking, is the commercial exchange of sex for something of value absent force, fraud, or coercion.¹¹⁰ However, people being trafficked do not always know they are being trafficked, and if they do, they are often reluctant to disclose this information to law enforcement officers.¹¹¹ As

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105. Erin Killeen, *The Increased Criminalization of African American Girls*, GEORGETOWN J. POV. LAW & P. BLOG (Apr. 17, 2019), https://www.law.georgetown.edu/poverty-journal/blog/the-increased-criminalization-of-african-american-girls/#_ftnref13 [<https://perma.cc/T3QP-622G>].
106. Swenstein & Mogulescu, *supra* note 8, at 2 (“We have observed wave after wave of policies, legislation, and media campaigns that prioritise a law enforcement approach to the issue of human trafficking and measure success only in the number of arrests made, regardless of the quality of the arrests, the sustainability of the ensuing prosecutions, or whether victims view the process as a good thing.”); *see e.g.*, Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price*, PROPUBLICA (Dec. 7, 2020), <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price> [<https://perma.cc/NG4G-5CJ5>] (“Eighteen current and former officers who policed the sale of sex in New York City said overtime has motivated them for years. . . . You arrest 10 girls, now the whole team’s making eight hours of overtime, retired Sgt. Stephen Antiuk said.”).
107. Kaplan & Sapien, *supra* note 106 (explaining that cops executing anti-sex trafficking operations “say they are incentivized to round up as many ‘bodies’ as they can”).
108. *Id.* (“A former officer who worked undercover told ProPublica she participated in false arrests. Others acknowledged the system could let them slip through. . . . Since 2014, the city has paid more than a million in taxpayer dollars to at least 20 people who claimed they were falsely arrested in prostitution or ‘john’ stings.”).
109. Barrick, Panichelli, Lambdin, Dang, & Lutnick, *supra* note 48 (“Congruent with other studies, our findings reveal that those being under-identified, and instead arrested for selling sex, are mostly minors, people of color, and female.”); Table 43B: Arrests by Race and Ethnicity Under 18, *Crime in the United States 2019*, FBI: Uniform Crime Reporting, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43> (last visited Mar. 22, 2021) [<https://perma.cc/44EY-BW8>]; Gilbertson, Mendelson, & Caputo, *supra* note 20.
110. *See* Open Society Foundations, *Understanding Sex Work in an Open Society*, OPEN SOCIETY FOUNDATIONS, <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> (last updated Apr. 2019) [<https://perma.cc/35UE-EZAL>] (“Sex workers are adults who receive money or goods in exchange for consensual sexual services or erotic performances.”).
111. Garry & Reinbrecht, *supra* note 7, at 13 (“[Sex] trafficking victims often do not self-identify as having been trafficked. Even when law enforcement asks questions designed to identify exploitation, trafficking victims are unlikely to disclose relevant information due to a myriad of factors, including distrust of or past negative experiences with law enforcement; fear of

a result, people being trafficked are often arrested as commercial sex workers.¹¹² A 2016 survey by the National Survivor Network found that of 130 survivors of human trafficking,¹¹³ over ninety percent reported having been arrested, and more than fifty percent reported their arrests were “directly related to their trafficking experience.”¹¹⁴

Law enforcement arrest many more sex workers—likely some of whom are actually trafficked individuals—than buyers or traffickers. To illustrate, according to data from the Los Angeles Police Department (“LAPD”), a statewide anti-sex trafficking law enforcement operation in 2020 resulted in the arrest of 190 commercial sex workers across California, compared to only 27 “pimps.”¹¹⁵ As part of this operation, the LAPD arrested 90 commercial sex workers, compared to only seven pimps.¹¹⁶

Not only does law enforcement arrest many sex workers during operations, but also a disproportionate number of Black individuals. According to data from 2010 to 2019, Black women account for nearly sixty-five percent of prostitution arrests in Los Angeles, where they make up only about nine percent of the city’s female population.¹¹⁷ Similarly, the FBI reports that in 2019, fifty percent of arrests of minors for “prostitution and commercialized vice” were Black.¹¹⁸ Operations result in the disproportionate arrest of Black individuals, in part, because of over-policing of Black neighborhoods¹¹⁹ and some law enforcement officers’ implicit

discipline by their trafficker; and the impacts of trauma.”). Notably, “[t]he problem of under- and misidentifying victims also impacts individuals involved in sex work who entered the industry as minors—and therefore, *de facto* sex trafficking victims—and then continued in the industry after they turn 18.” *Id.* Moreover, some individuals who were trafficked for sex at a young age later turn to sex work for financial reasons. *See* Gilbertson, Mendelson, & Caputo, *supra* note 20 (noting a case in which an individual went “from trafficking victim to willing sex worker”).

112. *See* Garry & Reinbrecht, *supra* note 7, at 13 (explaining that law enforcement officers often rely on people being trafficked to self-identify, which they infrequently do).
113. Of the 130 survivors surveyed, “[t]he majority, 72 were sex trafficking victims, 6 were labor trafficking victims and 9 had experienced both.” *Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, NAT’L SURVIVOR NETWORK (Aug. 2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2019/08/NSNVacate-Survey-2018.pdf> (last visited Nov. 11, 2021).
114. *Id.*
115. *See id.* (noting how LAPD did not distinguish between “pimps” and “traffickers”); *see also* Cal. Penal Code § 266h (demonstrating how under California law, a “pimp” refers to an individual who profits from prostitution without using force, fraud, or coercion).
116. Gilbertson, Mendelson, & Caputo, *supra* note 20 (explaining that KPCC/LAist also “found that [Los Angeles-based] operations ensnared female sex workers far more often than any traffickers, and the women arrested rarely ended up in programs designed to get them out of the sex trade.”).
117. *Id.*
118. Table 43B: Arrests by Race and Ethnicity Under 18, *supra* note 109.
119. *See* Jasmine Phillips, *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*, 62 UCLA L. REV. 1642, 1656 (2015) (explaining that “[o]fficers sweep areas known for prostitution -- also called strolls or tracks,” such as South Los Angeles, which also happen to be BIPOC neighborhoods). *Census Reporter, Los*

racial bias.¹²⁰

a. Over-Policing of Black Neighborhoods

Black individuals are at an increased risk of arrest for buying or selling sex in part because there is evidence that law enforcement disproportionately execute anti-sex trafficking operations in Black neighborhoods.¹²¹ In New York City, for example, anti-sex trafficking efforts purportedly focus on arresting commercial sex buyers while ensuring individuals selling sex are doing so consensually. However, such efforts involve “[t]eams of NYPD officers [descending] on minority neighborhoods, leaning into car windows and knocking on apartment doors, trying to get men and women to say the magic words: agreeing to exchange sex for money.”¹²² In New York City, eighty-nine percent of people charged for selling commercial sex are not white.¹²³ Additionally, while sixty-five percent of commercial sex buyers in New York City are white, individuals who are not white make up ninety-three percent of those accused of buying commercial sex.¹²⁴ Despite comparable complaints about sex work, police arrested over three times as many people for buying commercial sex in majority Black and Latino neighborhoods compared to white neighborhoods.¹²⁵

While some of this data speaks to arrests for buying, not selling commercial sex, both are products of targeting neighborhoods of color.¹²⁶ Moreover, data about arrests for buying commercial sex is notable given that New York City has spent more than a million taxpayer dollars to individuals falsely arrested in ‘john stings,’ which target buyers of commercial sex.¹²⁷ Logically, Black individuals are at increased risk of false arrest due to the over-policing of their neighborhoods.

b. Implicit Racial Bias

The disproportionate arrest of Black individuals selling commercial sex is

Angeles County, CENSUS REPORTER, <https://censusreporter.org/profiles/79500US0603751-los-angeles-county-south-central-la-city-south-centralwatts-puma-ca/> (last visited Dec. 18, 2021) (explaining that in 2019, South Los Angeles was majority Hispanic (80%) and Black (18%) and less than 1% white).

120. Phillips, *supra* note 119 (“[R]ace informs vulnerabilities to criminalization...Black girls are more likely to be criminalized as prostitutes and Black men are more likely to be prosecuted as traffickers.”).

121. *See id.*

122. *See* Kaplan & Sapien, *supra* note 106 (explaining that while such stings are described as Mayor Bill de Blasio's efforts to “combat human trafficking,” they are clearly more interested in criminalizing consensual sex work, that inadvertently leads to the arrest of people being trafficked).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

also likely due, in part, to racial bias of some law enforcement officers.¹²⁸ Cheryl Nelson Butler explains:

Minorities continue to be stigmatized and profiled as criminals generally and these biases undermine the ability of police and other stakeholders to properly recognize when minority youth have not consented to prostitution and thus have been trafficked. Judges, legislators, and others presume that girls from certain racial groups are “oversexed” and likely to consent to prostitution.¹²⁹

Notably, individuals under the age of eighteen can never consent to commercial sex.¹³⁰ The TVPA defines sex trafficking as when an adult performs a commercial sex act because of force, fraud, or coercion, or when a minor performs a commercial sex act, regardless of whether they do so because of force, fraud, or coercion.¹³¹ Yet law enforcement officers and other officials who come in contact with a Black youth being trafficked are more likely to view that minor as a criminal than as someone experiencing sex trafficking.¹³²

This under-identification of Black youth as being trafficked results in their disproportionate arrest and criminalization.¹³³ For example, a 2020 study that evaluated 541 incidents of someone selling sex in San Francisco found:

[Victims] being under-identified and instead arrested for selling sex, are mostly minors, people of color, and female...Racial bias due to the adultification of [B]lack girls within the criminal legal system has led to their incarceration as young as 13–14 when active in sex trade.¹³⁴

Black minors who engage in commercial sex should be treated as legal victims under the TVPA, yet law enforcement officers often arrest youth being sex trafficked despite their inability to consent to sex.¹³⁵

In sum, racially biased policing practices, such as patrolling neighborhoods of color and disproportionately arresting Black individuals for minor crimes, reinforce the abuse-to-prison pipeline which not only disproportionately harms Black individuals, but also people experiencing trafficking.

128. Phillips, *supra* note 119, at 1656 (“[R]ace informs vulnerabilities to criminalization...Black girls are more likely to be criminalized as prostitutes and Black men are more likely to be prosecuted as traffickers.”).

129. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1498 (2015).

130. 18 U.S.C. § 1591 (2000).

131. *Id.*; Phillips, *supra* note 119, at 1642 (explaining that the 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.”).

132. See Nelson Butler, *supra* note 129, at 1499.

133. See *id.* at 1495 (“[T]he proper identification of prostituted victims as people of color, and minors in particular, continues to be undermined by centuries old stereotypes about race.”).

134. Barrick et al., *supra* note 48.

135. Table 43B: Arrests by Race and Ethnicity Under 18, *supra* note 109.

3. Recommendations

Consistent with the goal of front-end criminal justice reform—to reduce the number of individuals that go to jail—law enforcement should not arrest youth who are responding to sexual trauma or involved in commercial sex. As Jasmine Phillips explains, addressing sex-trafficking primarily with a law enforcement response, “reinforce[s] racial profiling and over surveillance in low-income communities of color.”¹³⁶

The recent attention to Black Lives Matter has highlighted the reality that “[p]olice officers are increasingly asked to deal with a myriad of issues,”¹³⁷—including issues they are not necessarily trained or best suited to handle. Rather than having police officers respond to issues of wellness or mental illness, which may result in criminalizing survivors of sexual abuse or sex trafficking, communities should supplement law enforcement with a “community-based public safety program,” where mental health, crisis resolution, and emergency medicine workers can respond to non-life-threatening situations.¹³⁸ For example, running away and truancy should not warrant a law enforcement response, and the social service system, not the juvenile justice system should support runaway youth.¹³⁹

In the meantime, to the extent that anti-sex trafficking efforts continue to put law enforcement officers at the forefront of identifying people being trafficked, law enforcement leadership should disincentivize arresting as many people as possible¹⁴⁰ and instead promote more thorough investigatory work rather than patrolling neighborhoods predominantly composed of racially marginalized individuals.¹⁴¹ Cases of coercion are undeniably hard to identify, which is why many people who experience trafficking are erroneously charged with

136. Phillips, *supra* note 119, at 1642.

137. Tanner, *supra* note 96.

138. See Walsh, *supra* note 3 (describing an existing program in Eugene, Oregon, where trained crisis resolution workers respond to some 911 calls); see also Tanner, *supra* note 96, at 10 (noting that in 2018, only twelve percent of Los Angeles Police Department dispatches were for violent crimes, whereas forty percent were for nonviolent complaints such as wellness checks and mental illness).

139. Dolan & Carr, *supra* note 24, at 26 (finding that these policy changes would improve the lives and opportunities of unaccompanied youth).

140. See Rashawn Ray & Clark Neily, *A Better Path Forward for Criminal Justice: Police Reform*, BROOKINGS Apr. 2021, at 12, <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-police-reform/> [<https://perma.cc/YR2H-SKL4>] (arguing for a “fundamental reconceptualization” of the mission of policing and the culture that “rewards citations and force”).

141. See Garry & Reinbrecht, *supra* note 7, at 11 (explaining that “the genesis of a [law enforcement] operation is often a complaint or tip about sex work or patrolling an area known for sex work, rather than a thorough sex trafficking investigation”).

prostitution.¹⁴² Instead of casting a wide-net to arrest anyone involved in the commercial sex trade—which inevitably criminalizes some people being trafficked—law enforcement should focus their resources on specialized training about trafficking and how to identify people being trafficked in a victim-centered and trauma-informed way. Law enforcement officers should receive not only implicit bias training, but also gender bias and gender stereotyping training to reduce the incarceration of girls and women who have experienced sexual abuse.¹⁴³ Resources should also be focused on taskforce building to ensure service providers, rather than just law enforcement, are available to support people being trafficked.

C. Increasing Police Accountability

1. Lack of Police Accountability for Sexual Misconduct

Though popular narratives highlight police misconduct against Black men, such as excessive force or shootings,¹⁴⁴ Black women face the same realities:

Black women’s interaction with the state, through law enforcement, is marked by violence. Black women are murdered by the police. They are assaulted and injured by the police. They are arrested unlawfully by the police; and finally, they are tried, convicted and incarcerated for defending themselves against nonpolice violence.¹⁴⁵

Police sexual misconduct is not often included in conversations about police misconduct.¹⁴⁶ Police sexual misconduct is when law enforcement officers engage in “sexual assault without consent (rape), sexual contact procured by force, threat of force or coercion, and unwanted or gratuitous sexual contact such as touching

142. See Ditmore, *supra* note 49, at 7-8, 54-55 (explaining that law enforcement officers often conflate trafficking and prostitution, which impedes anti-trafficking efforts and results in trafficking victims being arrested and charged).

143. Saar, Epstein, Rosenthal, & Vafa, *supra* note 100, at 23 (suggesting that law enforcement officers have training on implicit and structural gender and racial bias that results in girls being incarcerated).

144. See YWCA, *The Current State of Black Women, Police Violence, and What We Are Doing About It*, YWCA (Feb. 17, 2021), <https://www.ywca.org/blog/2021/02/17/the-current-state-of-black-women-police-violence-and-what-we-are-doing-about-it/> [<https://perma.cc/DTZ9-H5GR>] (“Although the popular narrative highlights the plight of [B]lack men when interacting with the police, the long history of police violence against [B]lack women are often excluded from the conversation.”).

145. Jacobs, *supra* note 28, at 41.

146. See Ritchie, *supra* note 49, at 13 (“Although sexual misconduct is the second most frequently reported form of police violence, it is certainly not the second most frequently talked about.”).

or groping.”¹⁴⁷ Black women,¹⁴⁸ transgender women¹⁴⁹ and women involved in commercial sex¹⁵⁰ disproportionately experience police sexual misconduct.

Police sexual misconduct against Black women gained a significant amount of national attention with the case of Daniel Holtzclaw, a White, former Oklahoma City police officer, who raped thirteen Black women during his tenure at the department.¹⁵¹ Holtzclaw sought out Black women with criminal records or history of drug abuse, believing he could intimidate them into silence.¹⁵² Although these women did speak up against him, and Holtzclaw was convicted of eighteen counts of rape and sexual battery,¹⁵³ police sexual misconduct remains vastly underreported, in part due to the power dynamic between the perpetrators and

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147. The U.S. Dep’t of Justice, *Law Enforcement Misconduct*, THE U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/law-enforcement-misconduct#sex> (last visited Nov. 24, 2021) [<https://perma.cc/9RQS-PCGW>]. There exists dispute about the expansiveness of the definition of police sexual misconduct, and other behaviors, such as verbal harassment, inappropriate searches, and traffic stops are also often included in the definition. Trombadore, *supra* note 49, at 161 (noting that “some scholars and news reporters focus on more serious forms of police-led sexual abuse such as kidnapping, assault, and rape, others document the less serious forms, such as voyeurism and verbal harassment”); Cassisi, *supra* note 27, at 142-43 (explaining that “[s]exual misconduct by law enforcement includes a wide range of behaviors,” not all of which are prohibited by law).
148. See Ritchie, *supra* note 49, at 17.
149. BREAKOUT! WE DESERVE BETTER, 10 (2014), https://issuu.com/youthbreakout/docs/we_deserve_better_report/1 [<https://perma.cc/5XVX-DPP8>] (reporting that a 2014 study in New Orleans found that fifty-nine percent of transgender respondents were extorted by law enforcement officers for sex, compared to only twelve percent of cisgender respondents).
150. Individuals working in the commercial sex industry and victims of sex trafficking are particularly vulnerable to police sexual misconduct, in part because they “are often targets of police stings involving sexually compromising situations.” Jonathan Blanks, *The Police Who Prey on Victims*, THE CATO INSTITUTE (Nov. 1, 2017), <https://www.cato.org/commentary/police-who-prey-victims> [<https://perma.cc/63SA-XAAT>]. “[S]ex workers are at a particular risk for sex-related police violence due to the stigmas surrounding them and their general vulnerability to abuse.” *Id.* See Howard Center for Investigative Journalism, *Arizona Homeland Security Agents Engaged in Sex Acts with Suspected Trafficking Victims*, MY HERALD REVIEW (May 12, 2020), https://www.myheraldreview.com/news/benson/arizona-homeland-security-agents-engaged-in-sex-acts-with-suspected-tracking-victims/article_b4b910e7-a3de-50d8-bc46-46547d38042a.html [<https://perma.cc/7LVW-8GEV>] (describing how the law enforcement community turns a blind eye to police sexual misconduct); Laura Wamsley, *Oakland To Pay 19-Year-Old Nearly \$1 Million In Police Scandal Settlement*, NPR (Jun. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/01/531056653/oakland-to-pay-19-year-old-nearly-1-million-in-police-scandal-settlement> [<https://perma.cc/7QH5-2Q6U>] (reporting that a teenager claimed she had sex with more than a dozen Bay Area law enforcement officers in exchange for information about prostitution stings).
151. Jacobs, *supra* note 28, at 69-70.
152. Lilly Workneh, *Daniel Holtzclaw and The Reality of Police Brutality Against Black Women*, HUFFPOST VOICES, https://www.huffpost.com/entry/daniel-holtzclaw-and-the-reality-of-police-brutality-against-black-women_n_566b0b4ee4b080eddf580671 [<https://perma.cc/3W8L-4QGV>] (Dec. 12, 2015).
153. Matt Ford, *A Guilty Verdict for Daniel Holtzclaw*, THE ATLANTIC (Dec. 11, 2015) <https://www.theatlantic.com/politics/archive/2015/12/daniel-holtzclaw-trial-guilty/420009/> [<https://perma.cc/7FEN-R8MV>].

victims of the abuse,¹⁵⁴ as well as the difficulty of reporting sexual abuse to the abuser’s place of employment.¹⁵⁵ Even when it is reported, law enforcement departments are reluctant to investigate police misconduct in general,¹⁵⁶ and sexual misconduct is no exception.¹⁵⁷

Law enforcement departments are also reticent to discipline those accused of sexual misconduct.¹⁵⁸ Police chiefs admit that their departments are incentivized to “stay quiet” about sexual misconduct to limit their liability.¹⁵⁹ As a result, officers who commit sexual misconduct are sometimes permitted to “quietly resign” rather than face decertification or other disciplinary action.¹⁶⁰ For example, even though the DOJ found that Baltimore Police Department officers “habitually” threaten individuals with prostitution charges to extort them for sex,¹⁶¹ Maryland has only decertified four officers in the past decade.¹⁶²

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154. THE INT’L ASS’N OF CHIEFS OF POLICE ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT 4 (June 23, 2011), <https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf> [<https://perma.cc/LW4R-Q8X6>] (explaining that the potential for police sexual misconduct increases when officers work independently, without direct supervision, and late at night outside of public scrutiny and when officers engage with “vulnerable” populations, such as “juveniles, crime victims, undocumented people, and those with addictions and mental illness.” These conditions of the profession “inadvertently create opportunities for sexual misconduct.”)
155. See Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1487, 1495 (2020).
156. John Kelly & Mark Nichols, *We Found 85,000 Cops Who’ve Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> [<https://perma.cc/45RR-E8FN>] (June 11, 2020) (finding that “[l]ess than 10% of officers in most police forces get investigated for misconduct”).
157. See Sukey Lewis & Sandhya Dirks, *Conduct Unbecoming*, NPR (May 27, 2021) <https://www.npr.org/transcripts/1000175441> [<https://perma.cc/CYW2-5BCP>] (explaining that, of one hundred cases of PSM in California that they reviewed, about one in three perpetrators were not investigated until after they had engaged in sexual misconduct with various individuals.); Cassisi, *supra* note 27, at 154-55 (describing how the Oakland Police Department minimized and improperly investigated allegations of PSM).
158. See Sukey Lewis, Sandhya Dirks, & Alex Emslie, *Patterns of Sexual Abuse Show Gaps in Police Disciplinary System*, NPR (June 24, 2021), <https://www.npr.org/2021/06/24/1009802477/patterns-of-sexual-abuse-show-gaps-in-police-disciplinary-system> [<https://perma.cc/2L2E-PU2Q>]; see also Matt Sedensky & Nomaan Merchant, *Hundreds of Officers Lose Licenses Over Sex Misconduct*, AP NEWS (Oct. 31, 2015), <https://apnews.com/article/Oklahoma-police-archive-oklahoma-city-fd1d4d05e561462a85abe50e7eae4ec> [<https://perma.cc/4NME-T7SE>] (reporting that “police chiefs told the AP that some departments also stay quiet about improprieties to limit liability, allowing bad officers to quietly resign, keep their certification and sometimes jump to other jobs.”).
159. Sedensky & Merchant, *supra* note 158.
160. *Id.*
161. Isidoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, THE CRIME REPORT (Mar. 12, 2020), <https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct> [<https://perma.cc/FWW8-965R>] (describing how “officers use their perceived ‘savior status’ to elicit sexual favors from women already traumatized by spousal abuse” and noting that “[an] officer claimed that dating domestic violence victims was ‘like shooting fish in a barrel.’”).
162. Kelly & Nichols, *supra* note 156.

Inadequate investigation and discipline of perpetrators of police sexual misconduct is due in part to the “blue wall of silence,” a concept analyzed in depth by former police lieutenant Tom Nolan.¹⁶³ The blue wall of silence is an implicit agreement between law enforcement officers to keep quiet about each other’s misconduct, to protect one another from disciplinary action, and to maintain a culture where “secrecy is promoted and rewarded.”¹⁶⁴ Moreover, many law enforcement departments lack explicit prohibitions of sexual misconduct,¹⁶⁵ and most states do not permit the public to access records of police misconduct.¹⁶⁶

2. Disproportionate Risk of Police Misconduct Against People Being Sex Trafficked

Anti-sex trafficking law enforcement operations are particularly conducive to officer sexual misconduct because they often involve officers posing as undercover commercial sex buyers.¹⁶⁷ In these situations, law enforcement officers are interacting with people being trafficked, who are especially vulnerable to officers’ abuse.¹⁶⁸

Various studies and media reports corroborate this claim. One study found that sixteen percent of sex workers and people who experienced trafficking reported having “been involved in sexual situations with the police.”¹⁶⁹ In a recent study of trafficking survivors in Hawaii, a survey participant reported “hook[ing] up” with police officers “regularly” and even selling sex “to many of the officers doing the stings.”¹⁷⁰ Another study of immigrant women who experienced sex trafficking, engaged in sex work, or endured both found that these individuals

163. Thomas Nolan, *Behind the Blue Wall of Silence*, 12 MEN AND MASCULINITIES 250, 251 (2009).

164. *The Blue Wall of Silence Perpetuates Racist Policing, Wrongful Convictions*, Montana Innocence Project, <https://mtinnocenceproject.org/the-blue-wall-of-silence-perpetuates-racist-policing-wrongful-convictions/> [<https://perma.cc/K4XV-3DH5>] (last visited Mar. 28, 2023).

165. Purvis & Blanco, *supra* note 155, at 1507 (“[M]ost police departments do not have official policies regarding sexual activity with civilians.”).

166. *Is Police Misconduct a Secret in Your State?*, WNYC, <https://project.wnyc.org/disciplinary-records/> [<https://perma.cc/5FNN-KLPQ>] (last visited Mar. 28, 2023) (stating that police misconduct records are confidential in twenty-three states and limited in fifteen states); see Kelly & Nichols, *supra* note 156 (“Despite their role as public servants, the men and women who swear an oath to keep communities safe can generally avoid public scrutiny for their misdeeds.”).

167. See e.g., Ditmore, *supra* note 49, at 39 (“Raids create circumstances facilitating police misconduct, including sexual misconduct, against trafficked persons.”); *102 Arrested in Multi-State Human Trafficking Operation*, HUTCH POST (Aug. 27, 2021), <https://hutchpost.com/posts/f093dd11-ee46-4712-995a-7833a74d815e> [<https://perma.cc/6N3L-UDKB>] (“Undercover law enforcement officers from federal, state and local agencies arranged meetings [to buy sex] with potential victims.”).

168. Blanks, *supra* note 150.

169. Erin Bistricher, “U” Stands for Underutilization: The U Visa’s Vulnerability for Underuse in the Sex Trafficking Context, 18 CARDOZO J.L. & GENDER 449, 474-75 (2012).

170. DOMINIQUE ROE-SEPOWITZ, ARIZ. STATE UNIV. OFFICE OF SEX TRAFFICKING INTERVENTION, & KHARA JABOLA-CAROLUS, HAW. STATE COMM’N ON THE STATUS OF WOMEN, SEX TRAFFICKING IN HAWAII: THE STORIES OF SURVIVORS 8 (2019).

were subjected to inappropriate behavior by law enforcement officers, ranging from sexual harassment to abuse.¹⁷¹ According to a service provider interviewed for this study, law enforcement officers are “having sex,” “getting blowjobs or hand jobs,” and then “turn[ing] around and arrest[ing] the people.”¹⁷²

Notably, in 2018, undercover agents with Homeland Security Investigations (HSI), the enforcement unit of the Department of Homeland Security that frequently investigates human trafficking, “repeatedly paid for and engaged in sexual acts with the suspected victims as part of their investigation.”¹⁷³ Over a five month period, HSI agents visited a number of massage parlors eighteen times and purchased sex on seventeen of those occasions.¹⁷⁴ After these visits, agents submitted reports to their supervisors that detailed the commercial sex exchanges and noted that “the females may be victims of human trafficking.”¹⁷⁵ A leaked policy handbook from 2008 explains that, with supervisor approval, undercover agents can engage in “otherwise illegal” behavior.¹⁷⁶ Supervisors signed off on reports detailing the commercial sex exchanges, and a county judge approved a search warrant that noted the agents’ undercover sexual activity.¹⁷⁷ The charges against the traffickers were largely dismissed due to the “unethical” behavior of the police investigating them.¹⁷⁸

The HSI case identifies a scenario where people being trafficked are not only abused by their traffickers but also by law enforcement officers. The case also exposes a loophole in police policy that provides agents with a defense to engaging in sex with people suspected of being trafficked: supervisor approval. Moreover, the media has identified many cases in which this behavior occurs is occurring without supervisor approval. For example, a teenager claimed she had sex with more than a dozen Oakland law enforcement officers in exchange for information about prostitution stings.¹⁷⁹ Additionally, according to ProPublica’s reporting on NYPD operations:

An undocumented woman from China reported that the detective undressed her and touched her breasts and vagina at an informal massage parlor in Queens. She told investigators that when the backup team arrived, they handcuffed her and walked her through the massage parlor naked. She said she begged them to let her get dressed, but they refused. One took a photo of her.¹⁸⁰

171. Ditmore, *supra* note 49, at 43.

172. *Id.* at 44.

173. Howard Center for Investigative Journalism, *supra* note 150.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Wamsley, *supra* note 150.

180. Kaplan & Sapient, *supra* note 106.

Another NYPD officer who participated in anti-sex trafficking law enforcement operations faced complaints of sexual misconduct by seventeen women prior to their arrests:

One [woman] said [the officer] penetrated her vagina with his finger, then washed his hands before officers arrived. Another said she performed oral sex on him and was arrested the next time she saw him. A third said she was in “only panties” as they danced and smoked marijuana for about 15 minutes and that he touched her vagina. A fourth...[said] he asked her to get completely naked and grabbed her buttocks.¹⁸¹

A retired NYPD sergeant explains: “The undercover can have a nice, cold beer and watch a girl take her clothes off — and he’s getting paid for it.”¹⁸² Further, some officers have reported that their department does not prohibit them from sending sexually graphic photos to minors or being naked during operations.¹⁸³

3. Recommendations

The blue wall of silence, lack of departmental prohibitions against sexual misconduct, and secrecy of police misconduct records all contribute to the lack of police accountability for sexual misconduct. Accordingly, all law enforcement departments should enact uniform and unequivocal prohibitions against law enforcement officers engaging in sexual contact while they are on duty, especially during anti-sex trafficking investigations.¹⁸⁴ Notably, a House Bill to reauthorize the TVPA would prohibit law enforcement officers from “engaging in any sexual act or in sexual contact with any witness or potential witness to such sex trafficking, or victim or person reasonably likely to be the victim of such sex trafficking over the course of the investigation.”¹⁸⁵ Lawmakers should expand the provision to apply to all crimes, rather than just sex trafficking. Such actions would prevent situations like those in the HSI case discussed above.

Finally, states should increase transparency of police misconduct records. More states should participate in initiatives such like the National Decertification Index (NDI), which publicizes a national registry of officers who lose their certificates or licenses due to misconduct.¹⁸⁶ Currently, only eleven states submit

181. *Id.*

182. *Id.*

183. Garry & Reinbrecht, *supra* note 7, at 26.

184. *See* Purvis & Blanco, *supra* note 155, at 1524.

185. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2021, H.R. 515089, 117th Cong. § 110 (2021).

186. International Association of Directors of Law Enforcement Standards and Training (IADLEST), *About NDI*, <https://www.iadlest.org/our-services/ndi/about-ndi> (last visited Nov. 24, 2021) [<https://perma.cc/LX3K-QZFY>].

records to the NDI,¹⁸⁷ and five of these states conceal the names of decertified officers.¹⁸⁸

Dismantling the blue wall of silence requires a cultural shift within law enforcement departments. Scholars suggest that law enforcement departments should hire more female officers to help encourage this shift, because “diversifying the police force helps disrupt at least some of the dominant messages and implicit cultural norms among police officers.”¹⁸⁹ Moreover, state legislatures should eliminate qualified immunity and “Law Enforcement Officer Bill of Rights” statutes. Qualified immunity protects state actors, including police officers, from liability for breaking the law, unless the law they violate is “clearly established.”¹⁹⁰ In practice, this doctrine prevents accountability for all kinds of police misconduct. Qualified immunity is derived from the Supreme Court’s interpretation of 42 U.S.C. § 1983, which does not provide for any immunities on its face.¹⁹¹ Yet in 2020, the Supreme Court declined to hear several cases raising the problematic outcomes from and questionable legality of the doctrine.¹⁹² Subsequently, Colorado passed a state-level civil rights law without qualified immunity.¹⁹³ Other states should follow suit.

Related to the qualified immunity doctrine, nearly all states have statutes that detail how law enforcement officers may be investigated and disciplined, sometimes referred to as Law Enforcement Officer Bill of Rights (LEOBRS). In practice, such statutes make it very difficult to successfully try and prosecute officers for excessive use of force.¹⁹⁴ In 2021, Maryland became the first state to repeal its LEOBR, which prohibited investigation of officer misconduct by anyone other than fellow officers.¹⁹⁵ All states should repeal such statutory protections of law enforcement.

187. *Id.* (noting that the states that report are Arizona, Connecticut, Florida, Indiana, Kansas, Minnesota, Montana, Oregon, Utah, Vermont, and Washington).

188. *Id.* (noting that the states that conceal officers name are Connecticut, Florida, Indiana, Montana, Vermont, and Washington).

189. Purvis & Blanco, *supra* note 155, at 1529.

190. Jay Schweikert, *Qualified Immunity*, INSIGHTS ON LAW AND SOCIETY (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/ [<https://perma.cc/R763-6G5X>].

191. *Id.*

192. *Id.*

193. *Id.*

194. Toella Pliakas, *Law Enforcement Officers’ Bill of Rights Should Be Repealed in All States*, TEEN VOGUE (May 13, 2021), <https://www.teenvogue.com/story/law-enforcement-bill-of-rights-what-is> [<https://perma.cc/ESE7-7RRQ>].

195. David Straughan, *Maryland Repeals Law Enforcement Officers Bill of Rights, A First*, INTERROGATING JUSTICE (May 3, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/maryland-law-enforcement-officers-bill-of-rights/> [<https://perma.cc/56B3-8EP2>]. In 2015, the investigation of Freddie Gray’s death in Baltimore police custody was delayed due in part to Maryland’s LEOBR. Pliakas, *supra* note 194.

CONCLUSION

The criminalization of poverty, racially biased police practices, and lack of police accountability result in mass incarceration and racial disparities in the U.S. criminal justice system. Police-led anti-sex trafficking efforts too often reinforce these disparities. Accordingly, anti-sex trafficking advocates, lawmakers, and criminal justice sector professionals should integrate front-end criminal justice reforms into their responses to sex trafficking. By working together to reduce the criminalization of poverty, reform racially biased police practices, and increase police accountability, the anti-sex trafficking and criminal justice reform movements can reduce the disparities that disproportionately impact Black individuals.