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# Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood

by Mikah K. Thompson\*

## INTRODUCTION

As an adolescent Black girl growing up in the Midwest in the 1980s and 1990s, I had a very good understanding of the do's and don'ts of life. I knew I should work hard in school and strive for good grades. I understood that I should be kind to others and respectful to my parents. And I knew that above all else, I should refrain from any behavior that might make me look like a fast girl.

As a journalist explained recently, "Being fast meant you were asking for something. Being fast could mean wearing certain lip colors or hairstyles, tight clothing, showing age-appropriate interest in the opposite sex, or even receiving interest from peers and older men – regardless of whether that interest was welcome or reciprocated."<sup>1</sup> For me, the best way to avoid being perceived as fast or womanish<sup>2</sup> was to dress modestly, lean into my natural shyness, and avoid being too aggressive with boys despite my budding interest in them. Ironically, my efforts to avoid being fast did little to protect me from sexually aggressive boys and men. Although I am not a survivor of sexual violence, I recall older boys and men making sexually suggestive comments to me starting at around the age of ten. From that young age, I learned that my actions could result in attention from men and boys that made me feel uncomfortable. I certainly wanted boys to like me, but I did not want to be assaulted, and I believed that acting like a fast girl might result in rape.

It is this loss of girlhood that is the subject-matter of this Article. While girls of all races must learn to navigate the world around them, I believe the journey is different for Black girls due to our country's history of slavery. American society utilized an array of misperceptions and stereotypes to justify the brutality of slavery, and chief among them was the belief that Black girls and women were hypersexual, immoral, and dishonest. These perceptions continue to persist today and may explain the difficulties Black girls and women face when they report the sexual violence committed against them.

This Article was inspired in part by my need to understand the environment that allowed entertainer Robert "R." Kelly to maintain a successful multi-decade career as a singer and songwriter despite the African-American community's knowledge that he had been

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\* Associate Professor of Law, University of Missouri-Kansas City. I would like to thank my colleagues at the UMKC School of Law for all of your support throughout the years. This piece is dedicated to Patricia Roberson Lipsey, my mother and my first love. Thank you for teaching me to embrace the beauty and complexity of my blackness and my womanhood. Finally, I would like to thank my husband Brandon P. Thompson and our four children Rashai, Myah, Maxwell and Ethan. You are my greatest blessings. Thank you for always being my champions.

<sup>1</sup> Elexus Jionde, *How Young, Black Girls Where Hypersexualized in America – And How That Enables Predators*, BUSTLE.COM (Jan. 9, 2019), <https://www.bustle.com/p/how-young-black-girls-were-hypersexualized-in-america-how-that-enables-predators-15727529>.

<sup>2</sup> See Dianne Smith, et al., *Three Black Women Remembering Womanish Girls*, in *WOMANISH BLACK GIRLS: WOMEN RESISTING THE CONTRADICTIONS OF SILENCE AND VOICE* 1, 1 (Dianne Smith, et al., eds., 2019) (explaining that in the south, the term "womanish" was used to describe girls who were "too fast, too hot, and waiting for trouble").

accused of sexually exploiting teenaged-girls.<sup>3</sup> When Kelly was tried on child pornography charges in 2008, he was acquitted, and at least one of Kelly's jurors has indicated that his perceptions of Kelly's alleged victims affected his vote. When asked about his assessment of the women's testimony, he stated, "I just didn't believe them. I know it sounds ridiculous. The way they dress, the way they act. I didn't like them. I disregarded all what they said."<sup>4</sup> This juror perceived Kelly's alleged victims to be fast girls and women who were unworthy of belief and perhaps undeserving of the law's protection.

This Article will show that many of society's perceptions of Black girls are rooted in slavery. Section I describes the origins of the stereotype that Black girls are promiscuous and demonstrates that this stereotype remains prevalent today. Section II describes the origins of the stereotype that African-Americans are inherently dishonest and considers the impact of this stereotype on Black girls who come forward with allegations of sexual violence. Section III discusses the effect historical stereotypes of Black girls have on the players in the justice system, including law enforcement officers, judges, jurors, defense attorneys, and prosecutors. Finally, Section IV advocates for training reforms and the use of certain courtroom practices that will combat the influence of these stereotypes.

## I. THE STEREOTYPIC CONNECTION BETWEEN BLACKNESS AND PROMISCUITY

One of the hallmarks of the era of chattel slavery is the set of perceptions slave owners and others utilized to justify the brutality of the institution. Stereotypes regarding the hypersexuality of Black girls and women served to rationalize and decriminalize the sexual violence<sup>5</sup> committed against them. Even after slavery was abolished, the justice system failed to protect Black girls and women. Today, these slavery-era perceptions and stereotypes continue to persist, particularly with regard to Black girls. Society tends to view Black girls as less innocent and more sexually advanced than White girls. This Section will explore the origins of the Black promiscuity stereotype and demonstrate its prevalence in modern society.<sup>6</sup>

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<sup>3</sup> See Kyle Eustice, *R. Kelly Secretly Marries 15-Year Old Aaliyah 22 Years Ago Today*, THE SOURCE.COM (July 31, 2016), <https://thesource.com/2016/07/31/r-kelly-secretly-marries-15-year-old-aaliyah-22-years-ago-today/>; Jionde, *supra* note 1 (stating that copies of a video allegedly showing Kelly engaging in sex acts with a 14-year old were sold in Black communities across America starting in 2002 and that Kelly's popularity soared during this time period).

<sup>4</sup> Jionde, *supra* note 1.

<sup>5</sup> I use the term "sexual violence" to reference all types of sex-based crimes, including rape, sexual assault, and sexual exploitation. "Sexual assault" is defined as "sexual contact or behavior that occurs without explicit consent of the victim." RAINN, *Sexual Assault*, <https://www.rainn.org/articles/sexual-assault> (last visited May 16, 2020). Some forms of sexual assault include attempted rape, unwanted sexual touching, forcing an individual to perform sexual acts, and penetration of an individual's body, also known as rape. *Id.* Rape, which is one form of sexual assault, is defined as sexual penetration without consent. *Id.* This article addresses various categories of rape, including stranger rape, acquaintance or date rape, and statutory rape. I use the term "sexual exploitation" to reference the act of taking sexual advantage of another person, oftentimes where a power differential exists between victim and offender.

<sup>6</sup> While this article focuses on the ways in which stereotypes affect society's treatment of Black girls and women who make accusations of rape, it is important to note that sexual assault victims of other races have also experienced mistreatment throughout our country's history based on racial and

A. Black Hypersexuality as a Justification for Sexual Violence during Slavery

*I now entered on my fifteenth year - a sad epoch in the life of a slave girl. My master began to whisper foul words in my ear. Young as I was, I could not remain ignorant of their import. . . . He peopled my young mind with unclean images, such as only a vile monster could think of. I turned from him with disgust and hatred. But he was my master. I was compelled to live under the same roof with him -- where I saw a man forty years my senior daily violating the most sacred commandments of nature.<sup>7</sup>*

In her memoir *INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF*, Harriet Jacobs details her life as a slave. She describes the ways in which her master's sexual advances impacted her girlhood beginning at age 15.<sup>8</sup> Even at such a young age, Jacobs understood that her status as an enslaved girl negated any right she had to refuse her master and guaranteed that no law would safeguard her innocence.<sup>9</sup>

Jacobs' understanding of her rights is consistent with slavery-era law, which generally failed to recognize rape against Black girls and women as a crime.<sup>10</sup> Legislators in both northern and southern states enacted laws that criminalized rape only when the victim was White.<sup>11</sup> Indeed, a failure to allege that a victim was White could result in the dismissal of rape charges, even where the defendant was a slave.<sup>12</sup>

Slavery-era laws did impose punishment for intraracial rape involving enslaved persons but typically failed to label the act as rape. As the defendant's attorney argued in *George (a slave) v. State*, an 1859 case involving the alleged sexual assault of an enslaved girl under the age of 10, "The crime of rape does not exist in this State between African slaves. . .

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ethnic stereotypes. See Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 101 n.212 (1987) (describing the rapes of Native American "squaws" by White men as well as negative treatment of Mexican-American and Asian-American rape victims).

<sup>7</sup> Harriet A. Jacobs, *INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF* at 27 (Yellin ed. 2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Jeffrey A. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 8 (2007) ("Raping a Black woman was not a crime for the majority of this Nation's history. First, the rape of a Black woman was simply not criminalized. And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and court holdings made clear the lack of recourse for Black women who were raped.").

<sup>11</sup> See Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 105 (1983) (citing Alabama Code of 1852, Mississippi 1857 Statute, and Tennessee 1858 Law, Pennsylvania Code of 1700, and Kansas Compilation of 1855). *But see* Warren v. State, 336 S.E.2d 221 (Ga. 1985) (citing an 1863 Georgia statute defining rape as "the carnal knowledge of a female whether free or slave, forcibly and against her will."). Wriggins notes that in jurisdictions where the race of the victim was not included in the legislative definition of rape, law enforcement typically ignored the rape allegations of Black women, leaving them with no legal recourse. *Id.*

<sup>12</sup> See *State v. Charles, a Slave*, 1 Fla. 298, 335-37 (1847) (affirming dismissal of criminal charges against a slave where the government's indictment failed to state that the victim was White). *Accord* Commonwealth v. Mann, 4 Va. 210, 210 (Va. Gen. Ct. 1820).

. [T]heir intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery.”<sup>13</sup> Obviously persuaded by counsel’s argument, the *George* court held that “there is no act which embraces either the attempted or actual commission of rape by a slave on a female slave.”<sup>14</sup> In another 1859 case, a Mississippi appellate court suggested that the rape of an enslaved person might constitute a trespass against the master.<sup>15</sup> Although the Mississippi legislature eventually passed a law explicitly criminalizing the rape of enslaved girls under the age of 12 and making the crime punishable by death or whipping, the law applied only when the rape was attempted or committed by an African-American.<sup>16</sup>

Though the rape of enslaved girls and women by White men was common and “a crucial weapon of white supremacy”,<sup>17</sup> the law failed to criminalize this conduct.<sup>18</sup> Slavery-era publications and slave narratives indicate that enslaved girls began to experience sexual violence at or near the start of puberty. While Jacobs describes a change in her master’s treatment of her beginning at age 15,<sup>19</sup> other narratives indicate that enslaved girls were expected to begin bearing children and thus became the targets of their masters’ sexual advances starting at age 12 or 13.<sup>20</sup>

In her book *WHEN RAPE WAS LEGAL*, Rachel Feinstein posits that slave owners routinely raped enslaved girls and women not just for their own sexual gratification, but also “to control, humiliate, and degrade enslaved women and men, increase slave labor and property by impregnating the women, and provide[ ] an avenue for white male bonding and white masculine performances . . . .”<sup>21</sup> Of particular importance was the slave holders’ economic incentive to rape and impregnate their female slaves. Because enslaved women’s children were classified as slaves regardless of the status of the father, slave owners faced no negative

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<sup>13</sup> *George (a slave) v. State*, 37 Miss. 316, 317 (1859).

<sup>14</sup> *Id.* at 320.

<sup>15</sup> *Minor (a slave) v. State*, 36 Miss. 630, 632 (1859).

<sup>16</sup> *George*, 37 Miss. at 320 (citing Mississippi Session Acts of 1860) (“[T]he actual or attempted commission of a rape by a negro or mulatto on a female negro or mulatto, under twelve years of age, is punishable with death or whipping, as the jury may decide.”). See also THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* at 306 (1996) (describing two Virginia cases from the late 18<sup>th</sup> century wherein male slaves were indicted for raping female slaves but noting that such cases were “rare” and “unique”).

<sup>17</sup> Wriggins, *supra* note 11, at 118. Wriggins notes that White men had “institutionalized access” to Black women during slavery. *Id.*

<sup>18</sup> MORRIS, *supra* note 16, at 305 (1996) (“[N]o white could ever rape a slave woman.”).

<sup>19</sup> See text accompanying note 7, *supra*.

<sup>20</sup> See National Humanities Center, *On Slaveholders’ Sexual Abuse of Slaves* at 3 (2007), <http://nationalhumanitiescenter.org/pds/maai/enslavement/text6/mastersslavesexualabuse.pdf> (citing narrative of Hilliard Yellerday, formerly enslaved in North Carolina). See also MELTON A. MCLAURIN, CELIA, A SLAVE: A TRUE STORY OF VIOLENCE AND RETRIBUTION IN ANTEBELLUM MISSOURI at 24-25 (1991) (stating that Celia’s owner purchased her when she was approximately 14 years old and raped her almost immediately, commencing a relationship of sexual violence and exploitation that would continue for five years).

<sup>21</sup> RACHEL A. FEINSTEIN, *WHEN RAPE WAS LEGAL* at 16 (2019). Feinstein notes that some slave owners used rape as a male bonding experience by inviting their friends to participate in acts of sexual violence. *Id.*

repercussions for raping and impregnating their slaves.<sup>22</sup> Indeed, when the government ended the international slave trade in 1808, slave owners gained a new incentive to rape and force the breeding of slaves.<sup>23</sup> As Dorothy Roberts notes, “[W]henever a white man impregnated one of his slaves, the child produced by his assault was his property.”<sup>24</sup> Thus, the rape of enslaved girls and women became “a wise investment strategy for cash-strapped slave owners interested in increasing the number of their slaves, even if they had to wait for the infants to become productive.”<sup>25</sup> Importantly, Roberts states that while the economic incentives were significant, at its most basic level the rape of enslaved girls and women by their owners was a dehumanizing act of terror that reinforced notions of White supremacy.<sup>26</sup>

White society rationalized the rape and forced breeding of slaves by promoting stereotypes about Black sexuality. They viewed enslaved men and women as lustful and naturally promiscuous.<sup>27</sup> In particular, White society’s perceptions of Black girls and women were consistent with the Jezebel stereotype, defined as an immoral, hypersexual being who was essentially unrapeable.<sup>28</sup> Described as the “bad black girl”, the Jezebel is “alluring and seductive as she either indiscriminately mesmerizes men and lures them into her bed, or very deliberately lures into her snares those who have something of value to offer her.”<sup>29</sup> Importantly, stereotypes about Black sexuality like the Jezebel impacted society’s

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<sup>22</sup> *Id.* at 21 (“Since all children born of enslaved women were legally considered slaves, U.S. law enabled white men to sexually exploit enslaved black women for economic advantages with no legal consequences or liabilities to themselves.”). See also Pamela D. Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89, 118-19 (2005) (stating that children born to enslaved women and their owners were barred from benefits usually granted to legitimate White children such as inheritance).

<sup>23</sup> See *The Emily*, 22 U.S. 381, 384 (1824) (citing the act of the 2d of March, 1807, c. 77. [lxvii.] to prohibit the importation of slaves into the United States after the 1st of January, 1808). See also FEINSTEIN, *supra* note 21, at 21 (stating that owners forced male and female slaves to have sex in order to reproduce and finding that enslaved women who were fertile were valued between one-sixth and one-fourth more than women who could not bear children).

<sup>24</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY* at 29 (1997).

<sup>25</sup> Bridgewater, *supra* note 22, at 119.

<sup>26</sup> ROBERTS, *supra* note 24, at 29.

<sup>27</sup> Bridgewater, *supra* note 22, at 116 (“Many members of the slave society excused the abuse by subscribing to a set of beliefs that characterized African female slaves as lascivious and immoral. They viewed female slaves as female counterparts of an exaggerated image of the African male slave: enormously physically powerful, dumb, and animalistic.”).

<sup>28</sup> See Carolyn M. West and Kamilah Johnson, *Sexual Violence in the Lives of African American Women* at 2, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SVAAWomenRevised.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf) (describing the common perception that “Black women’s innate hypersexuality made them ‘unrapeable’ and underserving of protection or sympathy.”). See also ROBERTS, *supra* note 24, at 10 (noting that the Jezebel stereotype was named after the biblical wife of King Ahab, a woman who was a “purely lascivious creature: not only was she governed by her erotic desires, but her sexual prowess led men to wanton passion.”).

<sup>29</sup> Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African-American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 636 (2000).

perceptions of enslaved children, with some Whites believing that the warm climate of Africa accelerated the physical development of Black children.<sup>30</sup>

These myths about enslaved girls and women allowed White society to blame them for the sexual violence committed against them.<sup>31</sup> Indeed, White women were jealous and resentful of the enslaved women who they perceived as so immoral and alluring that they enticed White men to have sex with them. As historian Winthrop D. Jordan notes, “Not only did the Negro woman’s warmth constitute a logical explanation for the white man’s infidelity, but, much more important, it helped shift responsibility from himself to her. If she was *that* lascivious – well, a man could scarcely be blamed for succumbing against overwhelming odds.”<sup>32</sup> Based in part on their perceptions of the hypersexuality of enslaved girls and women, White women sometimes reacted to their husbands’ unfaithfulness by physically abusing female slaves and murdering or selling their children.<sup>33</sup>

## B. The Persistence of Stereotypes concerning Black Sexuality in Post-Civil War America

In 1865, Congress passed and the states ratified the 13<sup>th</sup> Amendment, which abolished slavery.<sup>34</sup> In 1866, Congress passed the 14<sup>th</sup> Amendment, which purported to provide the formerly enslaved population with equal protection under the law, and the states ratified the 14<sup>th</sup> Amendment in 1868.<sup>35</sup> For non-White rape victims, the enactment of the 14<sup>th</sup> Amendment meant that the laws criminalizing rape would protect them regardless of their race.<sup>36</sup> Despite the promises of the 13<sup>th</sup> and 14<sup>th</sup> Amendments, Black girls and women continued to experience sexual violence, and the justice system often failed to hold their assailants accountable.

Black girls and women experienced rape and other forms of sexual violence in a variety of contexts following the end of slavery. Scholars have suggested that Black women were more vulnerable to rape as compared to their White counterparts because they worked

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<sup>30</sup> See William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1063 (1993) (citing *State v. Sam*, 60 N.C. 300, 302, 1 Win. 7 (1864)).

<sup>31</sup> Bridgewater, *supra* note 22, at 116.

<sup>32</sup> WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* at 151 (1968).

<sup>33</sup> See FEINSTEIN, *supra* note 21, at 60.

<sup>34</sup> U.S. CONST. amend. XIII. § 1. Notably, the 13<sup>th</sup> Amendment did not abolish slavery “as a punishment for crime . . .” *Id.* Although President Abraham Lincoln’s Emancipation Proclamation freed enslaved people in 1863, many believed the proclamation was unconstitutional. Lincoln’s concern about legal challenges to the Emancipation Proclamation necessitated passage of the 13<sup>th</sup> Amendment. See Adam M. Carrington, *Running the Robed Gauntlet: Southern State Courts’ Interpretation of the Emancipation Proclamation*, 57 AM. J. LEGAL HIST. 556, 556-57 (2017).

<sup>35</sup> *Id.* at amend. XIV.

<sup>36</sup> See Pokorak, *supra* note 10, at 21-22 (stating that, “Although the passage of the Thirteenth Amendment was sufficient to end slavery and was a reasonable basis for the end of de jure criminal discrimination, the passage of the Fourteenth Amendment pointedly abolished the statutory assignment of different punishments for rapes committed by different races.”). Pokorak notes that supporters of the Amendment argued that “[f]ailure to enact the Fourteenth Amendment was considered equivalent to re-enslavement.” *Id.* at 21.

outside the home, exposing them to the sexual advances of their employers.<sup>37</sup> Additionally, domestic terrorists, including the Ku Klux Klan, subjected Black girls and women to rape as a part of their larger campaigns of violence against African-Americans.<sup>38</sup> These groups sometimes sexually assaulted Black women in the presence of their husbands, who were unable to intervene.<sup>39</sup> Black girls were not spared from the sexual violence of domestic terror groups, with girls as young as 12 years of age being raped and at times gang-raped by klansmen.<sup>40</sup> As one researcher notes, these “groups of white men [were] impelled to violence by a complex of racial and sexual animus.”<sup>41</sup>

While sexual violence remained a problem in the post-Civil War period, prosecutors typically failed to take seriously reports that a Black woman had been raped.<sup>42</sup> The justice system’s reluctance to prosecute cases involving Black victims, especially in light of the robust albeit racist impulse to prosecute and sometimes execute Black men for allegedly raping White women,<sup>43</sup> suggests that slavery-era stereotypes and myths concerning the promiscuity of Black girls and women had a major impact on law enforcement authorities.

Perceptions about the hypersexuality of Black men and women remained intact during the Jim Crow era. Jennifer Wriggins notes that the legal system reinforced the stereotype that Black girls and women were promiscuous.<sup>44</sup> She cites *Dallas v. State*, a 1918 Florida Supreme Court case wherein the court considered whether it was appropriate for the trial court to presume the chastity of a White girl who was an alleged victim of statutory rape.<sup>45</sup> The court stated that although it would be rare to find an unchaste girl of the “Caucasian race”, “we would blind ourselves to actual conditions if we adopted this rule

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<sup>37</sup> See Wriggins, *supra* note 11, at 119. Accord Bridgewater, *supra* note 11, at 129 (“Many black women who worked as domestics in the homes of whites were, like their enslaved ancestors, vulnerable to sexual abuse.”).

<sup>38</sup> See Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 719-20 (2002) (noting that White supremacist terror groups often used rape as “an instrument of terror”). These groups also raped White women. *Id.* (“Klansmen did not, however, restrict themselves to molesting women of the supposedly ‘inferior’ race, for while extant sources suggest that white women were singled out far less often for abuses of this kind, women of both races were subject to their depredations.”).

<sup>39</sup> *Id.* at 721-22.

<sup>40</sup> *Id.* at 729-30. Cardyn notes that klansmen also raped and sodomized Black men and boys as acts of terror. *Id.* at 735.

<sup>41</sup> *Id.* at 730.

<sup>42</sup> Pokorak, *supra* note 10, at 22 (“[A]lthough statutes facially included victims of all races, raping a Black woman remained a crime not worthy of a prosecutor’s attention or effort. The experience for Black women was the same under either legal regimen – no legal outlet for vindication of the most egregious violations.”).

<sup>43</sup> See Taylor, *supra* note 6, at 106 (stating that the stereotype of “the black rapist preying on defenseless white women” resulted in approximately 5,000 lynching deaths between 1882 and 1946). Taylor notes that lynch mobs sometimes employed the stereotype as a political tactic, often falsely accusing Black men of raping White women in order to justify violence against freedmen. *Id.*

<sup>44</sup> Wriggins, *supra* note 11, at 121.

<sup>45</sup> See *Dallas v. State*, 79 So. 690 (1918). Under Florida law, an essential element of the crime of statutory rape was proof that the female was “of previous chaste character.” *Id.* at 691.

where another race that is largely immoral constitutes an appreciable part of the population.”<sup>46</sup>

Post-Civil War courts displayed a tendency to consider chastity when assessing all types of rape allegations involving Black girls. Because Black girls were perceived as sexually promiscuous, the chastity requirement meant that naturally unchaste Black girls could not be raped.<sup>47</sup> Mary Frances Berry explains that individuals accused of raping children often defended their actions by attempting to prove consent, particularly when the child was close to the age of majority.<sup>48</sup> According to Berry, when the children were Black, “the theme of racial promiscuousness embellished the defendant’s tale of enticement.”<sup>49</sup> She describes an 1879 case where a White man named Conrad Anschicks was accused of raping Liney King, a three-and-a-half foot tall Black girl whose exact age could not be determined. Although Liney believed she was ten or eleven years old, her father, a former slave, had no records to prove her date of birth.<sup>50</sup> Unable to establish that Liney was under ten, the age of consent in Texas at the time, the prosecution sought to prove forcible rape.<sup>51</sup> Anschicks responded by offering the testimony of White witnesses that Liney was “very forward” around him and dressed and behaved like a woman.<sup>52</sup> Although a jury convicted Anschicks, the Texas Court of Appeals found that the prosecution did not prove the absence of consent by Liney and overturned the conviction.<sup>53</sup> Berry argues that the court’s ruling “reinforced the social order: white men could indulge themselves sexually with black girls and women.”<sup>54</sup>

### C. Modern-Day Perceptions of Black Sexuality

Before determining whether the social order described by Berry persists today,<sup>55</sup> it is necessary to explore modern-day perceptions concerning the sexuality of Black girls and women. Researchers have firmly established that the Jezebel stereotype perseveres today. Roxanne Donovan and Michelle Williams argue that modern-day perceptions of Black women, including stereotypical images such as “welfare queens, hoochies, freaks, and hoodrats” can find their origins in the Jezebel stereotype.<sup>56</sup> They argue that regardless of the name, these stereotypes convey the message that Black women are “sexually available and

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<sup>46</sup> *Id.*

<sup>47</sup> Wriggins, *supra* note 11, at 121 (“Because of the way the legal system considered chastity, the association of Black women with unchastity meant not only that Black women could not be victims of statutory rape, but also that they would not be recognized as victims of forcible rape.”).

<sup>48</sup> MARY FRANCES BERRY, *THE PIG FARMER’S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE* 180 (1999).

<sup>49</sup> *Id.*

<sup>50</sup> *Anschicks v. State*, 6 Tex. App. 524, 526 (1879); *accord* BERRY, *supra* note 48, at 181. Because the state could not prove Liney’s age, the defendant was not charged with statutory rape. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Anschicks*, *supra* note 50, at 529.

<sup>53</sup> *Id.* at 541.

<sup>54</sup> BERRY, *supra* note 48, at 182.

<sup>55</sup> I argue that in modern society, the justice system provides men of all races with greater leeway to sexually exploit and abuse Black girls and women. *See* Section III, *infra*.

<sup>56</sup> Roxanne Donovan & Michelle Williams, *Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors*, 25 *WOMEN & THERAPY* 95, 98 (2002).

sexually deviant.”<sup>57</sup> Media portrayals, including music videos, rap songs, and movies, reinforce these perceptions of Black women.<sup>58</sup> In support of their argument, Donovan and Williams reference a study wherein college students were shown sexually seductive rap videos featuring Black women. After watching the videos, the students were more likely to describe Black women as “indecent, sleazy, and sluttish.”<sup>59</sup> Similarly, Kimberlé Crenshaw argues that long-held stereotypes about the hypersexuality of Black women have rendered them virtually unrapeable, just as they were deemed during slavery.<sup>60</sup>

To be sure, these modern-day stereotypes of Black women also impact Black girls. A 2017 Georgetown Law Center on Poverty and Inequality study, entitled GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD, found that adults view Black girls as more adult-like and less innocent than their White counterparts.<sup>61</sup> The study concluded that “Black girls were more likely to be viewed as behaving and seeming older than their stated age, more knowledgeable about adult topics, including sex, and more likely to take on adult roles and responsibilities than what would have been expected for their age.”<sup>62</sup> While the “adultification” of Black girls starts as early as age five, it peaks between the ages of ten and 14 and continues through age 19.<sup>63</sup> Because adults view Black girls as older and more knowledgeable about adult topics, they are less likely to believe that Black girls are innocent and in need of protection.<sup>64</sup> The adultification of Black girls likely impacts their treatment in several areas, including school disciplinary processes, the juvenile justice system, and the criminal justice system.<sup>65</sup>

The GIRLHOOD INTERRUPTED study found that the adultification of Black girls is largely influenced by stereotypes that Black girls and women are aggressive, loud, sassy and

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<sup>57</sup> *Id.* See also Carolyn M. West, *Still on the Auction Block: The (S)exploitation of Black Adolescent Girls in Rap(e) Music and Hip-Hop Culture*, in THE SEXUALIZATION OF CHILDHOOD: CHILDHOOD IN AMERICA 89, 91 (Sharna Olfman, ed., 2009) (“Just like their enslaved ancestors, contemporary black women’s bodies are accessible, exchangeable, and expendable on the new cyber-auction block.”).

<sup>58</sup> *Living at the Intersection*, *supra* note 56 at 98. *Accord* West, *supra* note 57, at 91 (arguing that certain types of rap music glorify misogyny in the form of sexual and physical violence against women and portray scantily clad women as “sexualized status symbols”).

<sup>59</sup> *Living at the Intersection*, *supra* note 56, at 98 (citing Sun-Lin Gan, et al., *Stereotyping Effect of Black Women’s Sexual Rap on White Audiences*, 19 BASIC & APP. SOC. PSY. 381 (1997)).

<sup>60</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (“Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot.”). See also Section I.A., *supra*.

<sup>61</sup> REBECCA EPSTEIN, ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 2 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The adultification of Black girls robs them of their innocence, and they also lose the latitude to make mistakes and learn from them and are instead held to adult standards of behavior. *Id.* at 6.

<sup>65</sup> *Id.* at 8 (“Adultification may serve as a contributing cause of the disproportionality in school discipline outcomes, harsher treatment by law enforcement, and the differentiated exercise of discretion by officials across the spectrum of the juvenile justice system.”).

hypersexual.<sup>66</sup> The researchers noted that these contemporary perceptions harken back to the era of slavery, where stereotypes such as the Jezebel were prevalent.<sup>67</sup> Similarly, Monique Morris argues that the Jezebel stereotype has morphed into the perception that Black girls are “fast”.<sup>68</sup> These perceptions have a significant impact on the maturation of Black girls, with “good” girls doing all they can to avoid being perceived as fast.<sup>69</sup> Additionally, the stereotype that Black girls are sexually promiscuous makes them more vulnerable to sexual predators, primarily because society often blames them for the sexual violence they experience.<sup>70</sup> Morris argues that school administrators’ responses to the sexual exploitation of Black girls are sometimes impacted by judgments about the moral decency of the girls, including assessments of the type of clothing they wear.<sup>71</sup> These judgments are consistent with the societal belief that fast girls, through their conduct, including their behavior as well as their clothing and makeup choices, make themselves more susceptible to rape.<sup>72</sup>

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<sup>66</sup> *Id.* at 5.

<sup>67</sup> *Id.* The researchers identified three stereotypes that influence the treatment of Black girls today: Sapphire, described as “emasculating, loud, aggressive, angry, stubborn, and unfeminine”; Jezebel, described as “hypersexualized, seductive and exploiter of men’s weaknesses”; and Mammy, described as “self-sacrificing, nurturing, loving, asexual.” *Id.*

<sup>68</sup> See MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 114-15 (2016). See also *Three Black Women*, *supra* note 2, at 1 (stating that, in the south, a “womanish” girl was one who was “too fast, too hot and waiting for trouble (getting big without a ring on it)”; Jonita Davis, *A Study Found Adults See Black Girls as “Less Innocent,” Shocking Everyone but Black Moms*, *THE WASHINGTON POST* (July 13, 2017), <https://www.washingtonpost.com/news/parenting/wp/2017/07/13/a-study-found-adults-see-black-girls-as-less-innocent-shocking-everyone-but-black-moms/> (“[F]rom the time they are talking and walking, little black girls are deemed ‘fast’, a word synonymous with promiscuity.”).

<sup>69</sup> See *Three Black Women*, *supra* note 2, at 1-2 (“For me as a southern Black girl, I knew that womanish was not a good stamp of approval by the older Black women in our community. . . . We were to wear our girdles so that our butts would not jiggle and attract the attention of horny boys. We were forbidden to ask questions about how babies were made.”); Andreana Clay, *Keepin’ It Real: Black Youth, Hip-Hop Culture, and Black Identity*, 46 *AM. BEH. SCI.* 1346, 1353 (2003) (stating that her mother and grandmother talked to her about “fast girls” when she was young).

<sup>70</sup> MORRIS, *supra* note 68, at 115 (stating that stereotypes about Black girls make them vulnerable to various forms of abuse). While it is true that sexual assault survivors are often blamed for the violence committed against them regardless of their race, Black survivors also must contend with stereotypes concerning their sexuality. See *Living at the Intersection*, *supra* note 56, at 98 (“Research has shown that women, in general, are more likely to be blamed for their sexual assault if they were drinking, dressed in revealing clothing, or went to a man’s apartment. Although Black women are susceptible to these rape myths, they are also burdened with the additional stereotype of black women as promiscuous.”).

<sup>71</sup> MORRIS, *supra* note 68, at 116.

<sup>72</sup> See, e.g., Shaunda Fowler, *My Soul Looks Back and Wonders How I Got Over: A Womanish Black Girl Reclaiming Her Superpower*, in *WOMANISH BLACK GIRLS*, *supra* note 2, at 61, 65 (noting the advice the author received from her aunt when the author was a young girl: “Don’t sit wid cho legs open, you gon’ get raped!”); Jionde, *supra* note 1 (describing fast girls as girls who wore red lipstick and eye-catching clothing and noting that many members of society were unbothered by singer R. Kelly’s alleged sexual exploitation of teenaged girls because “[t]o them, his victims were fast girls who didn’t deserve justice.”).

Society's tendency to blame Black girls for their own sexual exploitation is especially concerning in the context of statutory rape. Statutory rape laws, which criminalize sexual contact with minors, reflect the belief that children lack the capacity to consent to sexual activity.<sup>73</sup> As Michelle Oberman notes, "Statutory rape is criminal because, even though it might look different from the classic model of stranger rape, it is no less an appropriation of another's physical, moral and psychic autonomy."<sup>74</sup> Oberman argues that statutory rape laws serve two functions:

The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability. It also represents a necessary complement to conventional rape law, which offers little protection to the teenager who, due to fear, confusion, coercion, or inexperience, has "consented" to unwanted sex.<sup>75</sup>

At first glance, it appears that statutory rape laws, which often impose a strict liability standard,<sup>76</sup> provide blanket protection for minors who might otherwise be subjected to sexual exploitation; however, the law's recognition of certain affirmative defenses to the crime of statutory rape demonstrates that protections may vary depending on the victim's race.

Several jurisdictions recognize mistake of age as an affirmative defense to statutory rape. For example, Illinois law states that a person accused of certain statutory rape offenses may assert the defense that he or she "reasonably believed the person to be 17 years of age or over."<sup>77</sup> Similarly, California courts have acknowledged good faith and reasonable mistake

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<sup>73</sup> Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 *BUFF. L. REV.* 703, 737 (2000) ("Statutory rape laws are predicated upon the belief that certain individuals are so vulnerable to sexual exploitation that they are incapable of consenting to sex.").

<sup>74</sup> *Id.* at 738.

<sup>75</sup> *Id.* at 710.

<sup>76</sup> *See, e.g., Owens v. State*, 724 A.2d 43, 47, 56 (Md. 1999) (finding that the state's statutory rape law has no mens rea requirement and applies a strict liability standard).

<sup>77</sup> 720 ILCS 5/11-1.70(b). This affirmative defense may be asserted in cases of criminal sexual abuse, defined as (1) sexual contact between an offender who is under the age of 17 and a victim who is at least nine years of age but under 17 years of age, and (2) sexual contact between a victim who is at least 13 years of age but under 17 years of age and an offender who is less than 5 years older than the victim. *Id.* at 5/11-1.50(b)-(c). The defense is also available to defendants charged with aggravated criminal sexual abuse, which is defined as sexual contact with a victim who is at least 13 years of age but under 17 years of age and an offender who is at least 5 years older than the victim. *Id.* at 5/11-1.60(d).

of age as a defense to statutory rape.<sup>78</sup> Alaska and Oregon statutes also provide for a reasonable mistake of age defense for certain types of statutory rape offenses.<sup>79</sup>

In addition to recognizing to a mistake of age defense, the Model Penal Code provides for a promiscuity defense for certain statutory rape offenses.<sup>80</sup> Although the American Law Institute acknowledges that certain provisions of the Model Penal Code's section on sexual assault and related offenses are outdated and in need of revision,<sup>81</sup> the current version of the Code states that individuals accused of statutory rape may defend themselves by proving by a preponderance of the evidence that the victim "had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others."<sup>82</sup> The drafters of the Code justified the use of this defense by asserting that the victim's prior sexual promiscuity "rebutts the presumption of naiveté and inexperience" that supports the criminalization of statutory rape.<sup>83</sup> While all states have declined to adopt the Model Penal Code's promiscuity defense and amended evidentiary laws that would allow for the admissibility of an alleged victim's

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<sup>78</sup> See *Menendez v. Whitaker*, 908 F.3d 467, 472 (9th Cir. 2018) (citing *People v. Hernandez*, 393 P.2d 673, 676–78 (Cal. 1964)). The *Hernandez* court stated: "We are persuaded that the reluctance to accord to a charge of statutory rape the defense of a lack of criminal intent has no greater justification than in the case of other statutory crimes, where the Legislature has made identical provision with respect to intent. At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense." 393 P.2d at 677 (internal quotations omitted).

<sup>79</sup> See Alaska Stat. § 11.41.445(b) (allowing for a mistake of age defense but also requiring that defendants show they made reasonable efforts to verify the age of the victim); Or. Rev. Stat. § 163.325 (stating that reasonable mistake of age may serve as an affirmative defense "when criminality depends on the child's being under a specified age other than 16" but when "the criminality of conduct depends on a child's being under the age of 16, it is no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be older than the age of 16."). Oregon law makes the statutory rape of a child under the age of 16 a strict liability offense but imposes a *mens rea* requirement for the statutory rape of a child under any other specified age. Oregon courts explain this distinction by noting that the law imposes harsher penalties for statutory rape crimes involving victims who are under the ages of 12 and 14: "The crime is more serious if the victim is under 12 or 14 than if she is older than those ages but under 16. The legislature has permitted a defendant who makes a reasonable mistake as to the younger ages to avoid the enhanced liability for the intercourse, but it has not permitted him to avoid all liability. The legislature has determined that a person who made a reasonable mistake about the younger ages should not be subjected to the greater punishments, but that any person who has intercourse with a girl under 16 should be punished in order to encourage men not to become involved with underage girls." *State v. Jalo*, 696 P.2d 14, 16 (Or. App. 1985), holding modified by *State v. Hoehne*, 78 Or. App. 479, 717 P.2d 237 (1986).

<sup>80</sup> See MODEL PENAL CODE § 213.6 (Am. Law. Inst., 1980).

<sup>81</sup> See American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses*, (<https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>) (last visited Jan. 6, 2020).

<sup>82</sup> *Id.* at § 213.6(3).

<sup>83</sup> *Id.* at § 213.6(3), cmt. 4, at 420.

prior sexual history at trial,<sup>84</sup> the Code's continued recognition of the promiscuity defense reflects a mindset that could impact Black girls who have experienced statutory rape.

Because the adultification of Black girls results in society perceiving them as older than their actual age and more sexually experienced than they actually are, statutory rape laws provide less protection for Black girls, particularly those who are teenagers. Even in jurisdictions where the mistake of age and promiscuity defenses are unavailable to defendants, the attitudes underpinning these defenses are at play when the public assesses statutory rape allegations. In an opinion piece concerning the statutory rape, sexual assault, and child pornography allegations against R. Kelly, Tressie McMillan Cottom writes that some have described one of Kelly's alleged victims, a 14 year-old girl, as "almost ready" because of her physical development.<sup>85</sup> Cottom notes that this type of comment is one she has heard many times, from both men and women, as a justification for the sexual exploitation of Black girls: "If one is 'ready' for what a man wants from her, then by merely existing she has consented to his treatment of her. Puberty becomes permission."<sup>86</sup> Others have described Kelly's 14-year old alleged victim as "fast", noting that she appeared to engage in consensual sexual activity with a man who looked like Kelly in an infamous sex tape that circulated throughout the Black community.<sup>87</sup>

In light of the fact that Black girls are perceived as sexually experienced adults, the public is often less outraged about their sexual exploitation. These modern-day perceptions concerning the sexuality of Black girls are directly connected to the perceptions that justified the rape of Black girls during slavery.

The slavery-era stereotypes described in this Section not only impact society's assessment of the sexuality of Black girls. They also affect the public's credibility assessments of girls who allege sexual exploitation and abuse. Section II will show that historical beliefs about the inherent dishonesty of African-Americans continue to negatively impact Black girls who make the difficult decision to come forward.

## II. THE STEREOTYPIC CONNECTION BETWEEN BLACKNESS AND DISHONESTY

In addition to advancing a set of perceptions about Black sexuality that justified sexual violence against slaves, White society promoted stereotypes regarding the inherent

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<sup>84</sup> See Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 521-22 (2012) ("In their recently drafted codes, few states have followed the MPC in supplying the [promiscuity] defense. And with the 1998 repeal of Mississippi's requirement that a victim be chaste as an element of statutory rape, perhaps no state recognizes chastity of the victim as an element or promiscuity of the victim as a defense."). See also note 134, *infra* (describing the widespread adoption of rape shield laws).

<sup>85</sup> Tressie McMillan Cottom, *How We Make Black Girls Grow up Too Fast*, THE NEW YORK TIMES (July 29, 2017) (<https://www.nytimes.com/2017/07/29/opinion/sunday/how-we-make-black-girls-grow-up-too-fast.html>).

<sup>86</sup> *Id.*

<sup>87</sup> Jionde, *supra* note 1. Jionde recalls that the sex tape, which allegedly featured R. Kelly urinating on a 14-year old girl, was sold in her neighborhood when she was a child. She also notes the common reaction to the fact that the man in the video urinated on the girl, as stated by a character in the animated television show, *The Boondocks*: "If she didn't want to get peed on, she would have moved out the way." *Id.* (internal quotations omitted).

dishonesty of Black people. Stereotypes concerning the dishonesty of African-Americans were linked to perceptions about their intelligence, or lack thereof, as well as perceptions about their innate immorality. For Black girls and women, beliefs about their inherent promiscuity also supported the stereotype that they were liars. These perceptions resulted in laws that prohibited Black people from testifying against Whites in court. Following the abolition of slavery, Blacks gained the capacity to testify against Whites but the law explicitly connected a given witness's credibility with her race, and, in sexual assault cases, the witness's past sexual conduct. Today, stereotypes of Black girls as liars and gold diggers persist, with factors such as the race of the accused impacting the credibility of sexual assault accusers, particularly within the Black community. This Section will discuss historical beliefs concerning the link between race and credibility. It will also address the impact that an accuser's race has on modern-day assessments of truthfulness.

#### A. Blackness as a Proxy for Slavery-Era Witness Competency

Slavery-era laws generally prohibited enslaved persons from testifying against Whites.<sup>88</sup> For example, under a 1717 Maryland law, slaves could testify against Blacks or Native Americans but had no capacity to testify against White Christians.<sup>89</sup> Whites offered a variety of justifications for the prohibition, which was common in the southern states.<sup>90</sup> Some argued that individuals in menial or degraded societal positions could not credibly take an oath to tell the truth.<sup>91</sup> Others argued that slaves were incapable of appreciating the obligation to tell the truth because they were not Christians<sup>92</sup> and that truthfulness, which is a mark of honor, could not be expected of a slave who was “permanently and ineradicably dishonored”.<sup>93</sup> Eventually courts allowed Blacks to testify against other Blacks and Native Americans so that enslaved persons would have the capacity to provide evidence regarding planned slave rebellions.<sup>94</sup> Importantly, even in states where slavery never existed like

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<sup>88</sup> See Fisher, *supra* note 30, at 1052. According to Fisher, free Blacks and free individuals of mixed race were also prohibited from testifying against Whites, but slaves, free Blacks and free individuals of mixed race could testify against each other. *Id.* at 1052, n.11.

<sup>89</sup> See Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, in *SLAVERY AND THE LAW* 209, 210 (Paul Finkelman, ed., 1996).

<sup>90</sup> *Id.* See also Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 *MO. L. REV.* 471, 473 (1966) (stating that the rule prohibiting Blacks from testifying against Whites was well established in the slave states).

<sup>91</sup> Morris, *supra* note 89, at 211.

<sup>92</sup> See *U.S. v. Dow*, 25 Fed. Cas. 901, 904 (C.C.D. Md. 1840) (stating that the “barbarous and brutal ignorance” of slaves as well as their “crude and monstrous superstitions” made them “incapable of feeling or appreciating the obligation of an oath, as felt and appreciated in a Christian community.”).

<sup>93</sup> Fisher, *supra* note 30, at 1077.

<sup>94</sup> Morris, *supra* note 89, at 213. Interestingly, abolitionists criticized this exception to the prohibition, arguing that the institution of slavery itself prevented an enslaved person from providing truthful testimony, particularly when offered against another slave, because southern law allowed for the emancipation of slaves who provided meritorious services, which included giving information about crimes committed by other slaves. *Id.* at 217.

California, Indiana, Iowa and Ohio, Blacks could not serve as witnesses in any case in which a White person was a party.<sup>95</sup>

Laws prohibiting Blacks from testifying against Whites impacted Black girls and women who were sexually assaulted by Whites. As discussed in the Section I, slavery-era laws generally failed to criminalize the rape of Black girls and women;<sup>96</sup> however, in some instances slave owners had standing to pursue criminal and civil penalties against the individuals who had sexually assaulted their slaves.<sup>97</sup> Slave owners had difficulty winning these cases, in part because of laws prohibiting Blacks from testifying against Whites. Unless the slave owner or another White person had witnessed the assault, slave owners could offer no admissible evidence that the incident had actually happened.<sup>98</sup>

Undoubtedly, perceptions concerning the credibility of Black girls and women supported these slavery-era laws. While society has traditionally stereotyped women of all races as liars when they allege rape,<sup>99</sup> Yarbrough and Bennett argue that a hierarchy of credibility existed during slavery and persists today.<sup>100</sup> They assert that men are considered more credible than women and that White women are considered more credible than Black women.<sup>101</sup>

Yarbrough and Bennett attribute Black women's position in the hierarchy to the pervasiveness of historical stereotypes. These stereotypes concern the sexuality of Black women as well as their truthfulness and often link sexual promiscuity with the tendency to

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<sup>95</sup> Avins, *supra* note 90, at 474 (citing cases).

<sup>96</sup> See Section I.A., *supra*.

<sup>97</sup> See Bridgewater, *supra* note 22, at 116-17. *Accord* Minor (a slave), 36 Miss. at 632 (suggesting that the rape of an enslaved person might constitute a trespass against the master).

<sup>98</sup> *Id.* ("Even if a slave owner did consider rape of his 'property' conduct warranting damages, unless he witnessed the assault firsthand, it was doubtful that he would rely on the account of a female slave over that of a male, free or enslaved. Further, most likely, a female slave's account would not have been believed without the supporting testimony of a white person."). See also Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism—Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 395-96 (2013) (describing an 1849 Virginia law that prevented Black people from testifying against a White defendant and noting that this law prohibited a Black female victim from testifying about a crimes committed against her by Whites).

<sup>99</sup> See Yarbrough & Bennett, *supra* note 29, at 629-30 (arguing that the historical stereotype of women as liars, "the subject of 'scientific' as well as popular literature", impacts women's credibility when they allege sexual violence or harassment); Taylor, *supra* note 6, at 75 ("Legal commentators for at least the past three centuries have written about women's tendency to lie about being raped."). Taylor notes that Wigmore, author of one of the most influential treatises on the law of evidence, argued that every woman who alleges rape should undergo an examination of her "social history and mental makeup" because of the "sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny." *Id.* at 76-78 (quoting 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 737, 740 (Chadbourn rev. ed. 1970)).

<sup>100</sup> Yarbrough & Bennett, *supra* note 29, at 634.

<sup>101</sup> *Id.* While Yarbrough and Bennett do not address the position of Black men in the hierarchy, America's history of lynching suggests that Black men were typically deemed less credible than White women. See text accompanying notes 159 through 165, *infra*.

lie.<sup>102</sup> The slavery-era stereotype of the Jezebel not only casts Black girls and women as hypersexual, insatiable and unrapeable,<sup>103</sup> but the Jezebel is also dishonest because she is so unchaste.<sup>104</sup> Another slavery-era stereotype that impacts the credibility of Black girls and women is the Mammy, described as “everyone’s favorite aunt or grandmother, sometimes referred to as ‘Aunt Jemima’, [who] is ready to soothe everyone’s hurt, envelop them in her always ample bosom, and wipe away their tears.”<sup>105</sup> It is the Mammy’s description as “asexual”, “obese” and “of dark complexion, with extremely large breasts and buttocks” that negatively affects the credibility of Black girls and women who display the physical characteristics of the stereotype.<sup>106</sup> Yarbrough and Bennett argue that by advancing the stereotype, male slave owners were able to disavow any sexual interest in Black women and convincingly deny their allegations of sexual violence.<sup>107</sup> These slave owners understood that White society would have difficulty believing that a White man might sexually desire a woman or girl who fit the stereotype.<sup>108</sup>

While these stereotypes served as justifications for laws prohibiting Blacks from testifying against Whites, variants of the Jezebel and Mammy stereotypes would continue to impact society’s credibility assessments of Black girls and women in the post-Civil War period well after they had gained the capacity to testify against Whites.

## B. Blackness as a Proxy for Witness Credibility in the Post-Civil War Period

The Enforcement Act of 1880, the first law Congress passed to enforce the 14<sup>th</sup> Amendment, extended to all persons the right to testify.<sup>109</sup> While southern states like Kentucky were slow to comply with the law,<sup>110</sup> by the end of Reconstruction, “the right to be a witness, theretofore denied, was deemed to be conceded.”<sup>111</sup> Despite this change, the justice system continued in its failure to protect Black rape victims. Wriggins notes that juries rarely heard cases involving the alleged rape of a Black woman or girl and that when these cases went to trial, discriminatory procedural rules created greater protections for

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<sup>102</sup> *Id.* at 638 (“[S]exual promiscuity is imputed to [Black women] even absent specific evidence of their individual sexual histories. This imputation ensures that their credibility is doubted when any issue of sexual exploitation is involved.”).

<sup>103</sup> *See* Section I.A., *supra*.

<sup>104</sup> Yarbrough & Bennett, *supra* note 29, at 638.

<sup>105</sup> *Id.* at 635-636. The Mammy stereotype developed in part because of the expectation that female slaves perform domestic duties for the family of their slave owner. *Id.* at 636-37.

<sup>106</sup> *Id.* at 637 (internal quotations omitted).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 639. This reasoning not only ignores the fact that White men were sexually attracted to Black girls and women who fit the physical description of the Mammy stereotype, but it also looks past the reality that slave owners sometimes raped for reasons other than sexual gratification. *See* text accompanying notes 21 through 26, *supra*.

<sup>109</sup> UNITED STATES STATUTES AT LARGE, 41 Cong. Ch. 114, May 31, 1870, 16 Stat. 140, § 16 (“*And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to . . . give evidence . . .” (emphasis in original)). *See also* Avin, *supra* note 90, at 501.

<sup>110</sup> *Id.* at 501-503.

<sup>111</sup> *Id.* at 503.

defendants, both Black and White.<sup>112</sup> Thus, while the process of pursuing a rape complaint was difficult for victims of any race, the treatment of Black rape victims was “incalculably worse.”<sup>113</sup>

The justice system’s poor treatment of Black rape victims from the period of Reconstruction through the mid-20<sup>th</sup> Century can find its basis in the same stereotypic assumptions concerning credibility that define the Jezebel and the Mammy. First, judges allowed lawyers to explicitly link witnesses’ credibility to their race, thereby playing upon stereotypes concerning the inherent dishonesty of African-Americans. As a part of her research on the topic of witness credibility and race, Sheri Lynn Johnson found that attorneys in the pre-Civil Rights Era often argued to juries that Black witnesses were inherently less trustworthy because of their race.<sup>114</sup> Wriggins describes a Black woman’s 1912 account of a trial judge’s response to her testimony that her employer had sexually harassed her. Following the woman’s testimony under oath, the judge responded, ““This court will never take the word of a nigger against the word of a white man.””<sup>115</sup>

Stereotypes concerning the credibility of African-Americans played out in a unique manner when Black girls and women made accusations of sexual violence. Early 20<sup>th</sup> Century courts applied two evidentiary principles to rape cases that demonstrated society’s skepticism toward allegations of rape. These principles created significant obstacles for any person who sought recourse from the justice system, but they were nearly impossible to overcome for Black girls and women because of their interplay with perceptions concerning the trustworthiness of the Jezebel and the Mammy.

The first obstacle was the requirement that an alleged rape victim’s testimony be corroborated by other evidence. In 1886, the New York legislature became the first to enact a law mandating corroboration for rape prosecutions in an effort to protect defendants from “untruthful, dishonest, or vicious” complaints.<sup>116</sup> Following New York’s lead, other states passed laws requiring corroboration,<sup>117</sup> and in 1904, the Georgia Supreme Court became the first court to impose the requirement in *Davis v. States*.<sup>118</sup> The court asserted, erroneously,<sup>119</sup>

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<sup>112</sup> Wriggins, *supra* note 11, at 120 (describing a procedural double-standard wherein “the fact that a defendant was Black was considered relevant only to prove intent to rape a white woman; it was not relevant to prove intent to rape a Black woman.”).

<sup>113</sup> *Id.* at 120, n.103.

<sup>114</sup> See Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996). See also Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1260 (“[F]or much of the twentieth century attorneys frequently argued that juries should discount or ignore the testimony of Black witnesses.”).

<sup>115</sup> Wriggins, *supra* note 11, at 120, n.104 (quoting *More Slavery at the South*, 72 THE INDEPENDENT, Jan. 25, 1912, at 197-200, reprinted in G. LERNER, BLACK WOMEN IN WHITE AMERICA 155-56 (1972)).

<sup>116</sup> Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 957 (2004) (quoting *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939)).

<sup>117</sup> *Id.*

<sup>118</sup> 48 S.E. 180 (Ga. 1904).

<sup>119</sup> Anderson, *supra* note 116, at 957 (stating that the *Davis* court’s reference to Lord Hale was contrary to the historical record). Accord 3 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 2061 (3d ed., 1940) (“[A]t common law, the

that the corroboration requirement had been a part of English common law and that it was still necessary due to the unique nature of rape:

The law is well established, since the time of Lord Hale, that a man should not be convicted of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence. . . . This rule appears to us to be a sound one. Without it, every man is in danger of being prosecuted and convicted on the testimony of a base woman, in whose testimony there is no truth. Of course, every woman, when she makes up her mind to prosecute for this offense, will testify that the sexual act was accomplished by force and without her consent. The man is powerless.<sup>120</sup>

Michelle Anderson notes that by the early 1970s, seven states had adopted corroboration requirements in all rape cases while eight states had expressed a preference for corroboration through either statutory or case law.<sup>121</sup> Another six states imposed corroboration requirements when certain facts were present, such as a delay in the timing of the complaint, and ten jurisdictions required corroboration where the alleged victim's testimony on its own was insufficient or improbable.<sup>122</sup> Moreover, the Model Penal Code's section on sexual offenses, originally published in 1962, states that "[n]o person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim."<sup>123</sup>

The corroboration requirement had a devastating impact on the reporting and successful prosecution of rape cases. For example, Lisa Crooms explains that although Washington, D.C. experienced an increase in reported rapes and rape arrests in the late 1960s and early 1970s, less than 50 percent of reported rapes were prosecuted.<sup>124</sup> A D.C. City Council task force empaneled to exam the state of rape law in the District found that rape was a significantly underreported crime.<sup>125</sup> The task force determined that the District's corroboration requirement likely had an impact on the non-prosecution rate because law

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testimony of the prosecutrix or injured person, in the trial of all offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary.").

<sup>120</sup> Davis, *supra* note 118, at 181-82.

<sup>121</sup> Anderson, *supra* note 116, at 958, 958 n.66.

<sup>122</sup> *Id.* at 958 n.66.

<sup>123</sup> MODEL PENAL CODE § 213.6(5) (Am. Law. Inst., 1980). The provision indicates that corroborative evidence may be circumstantial. It also states that juries in sexual offense cases "shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." *Id.*

<sup>124</sup> See Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459, 490 (1997).

<sup>125</sup> *Id.*

enforcement officials viewed uncorroborated rape claims as lacking credibility.<sup>126</sup> The task force also noted the presence of race-based and sex-based bias among prosecutors: “With prosecutorial staffs running heavily all white and male, attitudinal problems have undermined the prosecutor’s ability to judge evenly and develop rapport with victims – especially with Black victims.”<sup>127</sup> While Washington D.C., like other jurisdictions, would go on to abrogate the corroboration requirement,<sup>128</sup> the perceptions that supported the rule continue to persist, especially for Black rape victims who must shoulder an inherent credibility problem because of their race and sex.

The second obstacle that the justice system imposed on alleged rape victims was the practice of linking a complainant’s credibility to her chastity. John Henry Wigmore, author of one of the most influential treatises on the law of evidence, argued that the chastity of an alleged rape victim was directly connected to her veracity.<sup>129</sup> Wigmore’s opinion was common in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, with many courts advancing the narrative that “[a] woman’s propensity for falsehood . . . increase[d] proportionately to her sexual experience.”<sup>130</sup> Black girls and women, who were perceived as naturally unchaste,<sup>131</sup> were also perceived as naturally untruthful.<sup>132</sup> As Wriggins explains, “[C]hastity could not be possessed by Black women. Thus, Black women’s rape charges were automatically discounted, and the issue of chastity was contested only in cases where the rape complainant was a white woman.”<sup>133</sup> A woman’s chastity or lack thereof was admissible evidence of her credibility in many jurisdictions until the enactment of rape shield laws, which generally

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<sup>126</sup> *Id.* at 490-91. The task force also noted that bias based on sex and race, described as a “stumbling block toward effective interaction between the prosecutor’s office and the complainant” had an impact on the non-prosecution rate. *Id.* at 491.

<sup>127</sup> MEMORANDUM ON REPORT OF THE PUBLIC SAFETY COMMITTEE TASK FORCE ON RAPE TO THE D.C. CITY COUNCIL 5 (Dec. 16, 1974) (quoted in Crooms, *supra* note 124, at 491).

<sup>128</sup> *See* Arnold v. U.S., 358 A.2d 335, 344 (D.C. banc 1976) (“[We reject, therefore, the notion given currency so long in this jurisdiction, that the victim of rape and other sex related offenses is so presumptively lacking in credence that corroboration of her testimony is required to withstand a motion for a judgment of acquittal.”). *See also* Anderson, *supra* note 116, at 968 (“[T]he corroboration requirement has also been almost eradicated from formal rape law.”).

<sup>129</sup> 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. ed. 1970).

<sup>130</sup> Wriggins, *supra* note 11, at 126. *See, e.g.,* State v. Apley, 141 N.W. 740, 746 (N.D. 1913) (“The proof offered by cross-examination of prosecutrix, as to the prosecutrix a year previously having been an inmate of a house of prostitution, should have been received. It bore upon her general credibility.”); Seals v. State, 40 S.E. 731, 732 (Ga. 1902) (holding that a woman’s bad character for chastity is probative of her credibility as well as the issue of consent). *But see* People v. Gray, 96 N.E. 268, 273 (Ill. 1911) (“If the reputation of the prosecuting witness for chastity were to be held admissible as going to her general credibility, then logically such testimony would be equally admissible as to the credibility of any female who might be called to give evidence in any case. The [lower] court properly excluded the evidence as to the reputation of the prosecuting witness for chastity.”); State v. Hobgood, 15 So. 406, 407 (La. 1894) (same).

<sup>131</sup> *See* text accompanying notes 47 through 49, *supra*.

<sup>132</sup> *See* Wriggins, *supra* note 11, at 126.

<sup>133</sup> *Id.* at 127. *See also* Taylor, *supra* note 6, at 103 (“Viewed by the white police as ‘loose women’ or ‘whores’, black women’s reports of rape have lacked legitimacy; they have not been cognizable victims.”).

exclude evidence of an alleged sexual misconduct victim's past sexual behavior or sexual predisposition.<sup>134</sup>

By the 1970s, researchers had begun to study whether the justice system was providing disparate protection to rape victims based on their race, with some concluding that police officers and juries showed significant bias when assessing rape allegations made by Black women.<sup>135</sup> A 1979 study of nearly 1,400 rape reports in the city of Philadelphia found that “[c]ases involving black victims tend to be investigated somewhat less thoroughly than cases involving white victims.”<sup>136</sup> Similarly, a 1968 study found that law enforcement authorities brought rape charges less frequently when the victim was Black and that the disparity was based primarily on “a lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity.”<sup>137</sup> Gary LaFree, whose research in the 1980s focused on conviction and sentencing disparities in sexual assault cases based on victim-offender racial composition, found that “black offender-white victim rapes resulted in substantially more serious penalties than other rapes” while “black intraracial assaults consistently resulted in the least serious punishment for offenders.”<sup>138</sup> Thus, Black men received significantly lighter punishments when their victim was Black even though Black women were two and one half times more likely to be raped than White women.<sup>139</sup>

In a related study of jury verdicts, LaFree found that jurors were less likely to believe rape allegations when the victim was Black.<sup>140</sup> He determined that stereotypes of Black women affected trial outcomes, with many White, middle-class jurors believing that Black women were more likely to consent to sex and less harmed by sexual assault because of their sexual experience.<sup>141</sup> LaFree notes that in one case involving the rape of a young Black girl, one juror believed the defendant should be acquitted “on the grounds that a girl her age from

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<sup>134</sup> See FED. R. EVID. 412. The federal rape shield law became effective in 1978. The rule excludes evidence of an alleged victim's sexual history or sexual predisposition “whether offered as substantive evidence or for impeachment.” *Id.* Today, every state has enacted some form of the rape shield law. See Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of A Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1377 (2005). The rape shield law has been viewed by some as a law that reinforces traditional gender stereotypes. See I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 842–43 (2013) (“Instead of subverting the chastity requirement, rape shield laws buy into them, allowing, in theory at least, any complainant in a rape trial to wipe her sexual history clean, to become a good girl again, to be brought back into the fold, and thus receive the protection of the law.”).

<sup>135</sup> See Cynthia Willis Esqueda, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 SEX ROLES 213, 215(1992).

<sup>136</sup> THOMAS W. McCaHILL, ET AL., *THE AFTERMATH OF RAPE* 239 (1979) (quoted in Taylor, *supra* note 6, at 103).

<sup>137</sup> Taylor, *supra* note 6, at 102 n. 215 (citing Comment, *Police Discretion and the Judgment that a Crime Has Been Committed – Rape in Philadelphia*, 11 U. PA. L. REV. 277, 304 (1968)).

<sup>138</sup> See GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* at 140, 145 (1989).

<sup>139</sup> Taylor, *supra* note 6, at 104 n.226 (citing C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 217 (1980)). See also Wriggins, *supra* note 11, at 122 (“The thorough denial of Black women’s experiences of rape by the legal system is especially shocking in light of the fact that Black women are much more likely to be victims of rape than are white women.”).

<sup>140</sup> *Id.* at 219.

<sup>141</sup> *Id.* at 220.

‘that kind of neighborhood’ probably wasn’t a virgin anyway.”<sup>142</sup> Finally, LaFree concluded that some jurors found Black complainants to be less credible, with one White juror stating that “Negroes have a way of not telling the truth.”<sup>143</sup> As scholars turned their research focus to date or acquaintance rape, the most common form of rape,<sup>144</sup> they determined that Black women who had been in a dating relationship with their alleged assailant were perceived as less credible and more responsible for their assaults as compared to their White counterparts.<sup>145</sup>

These studies demonstrate that slavery-era stereotypes concerning the credibility of Black girls persisted throughout the 20<sup>th</sup> Century. Next, I will explore whether perceptions concerning the inherent untruthfulness of the Jezebel and Mammy affect Black girls and women today.

### C. Blackness as a Modern-Day Proxy for Credibility

While a number of reforms in the late 20<sup>th</sup> Century resulted in the abrogation of the corroboration requirement and the enactment of rape shield laws that generally prohibited juries from using an alleged victim’s sexual history to assess her credibility, Black rape victims continue to feel the impact of the Jezebel and Mammy stereotypes. Society tends to judge Black rape survivors as less credible, and they “receive less empathy, consideration, and judicial support than their White counterparts.”<sup>146</sup> In fact, research in this area suggests that the belief that Black rape victims lack credibility persists in both White and Black communities.<sup>147</sup>

Modern-day stereotypes of Black girls also impact their credibility. Researchers have found that the Sapphire stereotype, popularized by a character in the 1950s television show *Amos and Andy*, influences societal perceptions of Black girls.<sup>148</sup> The Sapphire is described as “evil, bitchy, stubborn and hateful” and her skin color is usually brown or dark brown.<sup>149</sup> The Sapphire is loud, aggressive, emasculating, angry, and unfeminine.<sup>150</sup> This stereotype tracks with modern-day perceptions of Black girls, who are often viewed as loud, aggressive, and dominating.<sup>151</sup> Because the Sapphire also has a reputation for being deceitful, disloyal, and dishonest, Black girls who display the characteristics of the stereotype may be perceived

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Willis Esqueda, *supra* note 135, at 214 (stating that a majority of rape incidents involve acquaintances rather than strangers). See also National Sexual Violence Research Center, *Get Statistics*, <https://www.nsvrc.org/node/4737> (last visited Jan. 11, 2020) (stating that in eight out of ten cases of sexual assault, the victim knew the perpetrator).

<sup>145</sup> See, e.g., Willis Esqueda, *supra* note 135, at 224; *Living at the Intersection*, *supra* note 56, at 97.

<sup>146</sup> *Id.* at 97.

<sup>147</sup> See Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 U.C.L.A. WOMEN’S L.J. 27, 40 (1996) (citing research).

<sup>148</sup> See Yarbrough & Bennett, *supra* note 29, at 638.

<sup>149</sup> *Id.*

<sup>150</sup> See EPSTEIN, *supra* note 61, at 5 (stating that the Mammy, Jezebel and Sapphire stereotypes “have persisted into present day culture, which “paint Black females as hypersexual, boisterous, aggressive, and unscrupulous.” (internal quotations omitted)).

<sup>151</sup> *Id.*

as less credible.<sup>152</sup> Another contemporary stereotype that likely impacts the credibility of Black girls is the Gold Digger, described as a girl or woman who “will sell, rent, or trade her body or sexuality for hard currency, basic needs such as groceries, or consumer items, including manicures, new clothes, or vacations.”<sup>153</sup> The stereotypical Gold Digger views her relationships as financial arrangements, and once the money runs out, she will turn on her man.<sup>154</sup> Indeed, in reaction to the sexual violence and exploitation claims made against R. Kelly in the early 2000s, many members of the public argued that his accusers could not be believed because they were just gold diggers seeking a payout.<sup>155</sup>

While both slavery-era and modern-day stereotypes impact the believability of Black girls who make accusations of sexual assault or rape, another factor appears to have a strong effect on the Black community’s reaction when a Black girl or woman accuses a Black man of rape. When asked about his decision to make music with R. Kelly despite the numerous allegations of sexual abuse that had been made against Kelly, recording artist Chance the Rapper acknowledged that working with the singer was a mistake.<sup>156</sup> He stated that when he made the decision to collaborate with Kelly, he viewed him as a victim.<sup>157</sup> He added: “We’re programmed to really be hypersensitive to black male oppression.”<sup>158</sup>

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<sup>152</sup> See Yarbrough & Bennett, *supra* note 29, at 639.

<sup>153</sup> West, *supra* note 57, at 91.

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., Gina Tron, *Who Are Sisters Lindsey Perryman-Dunn And Jen Emrich, Who Defend R. Kelly In Part II Of “Surviving R. Kelly”?*, OXYGEN.COM (Jan. 3, 2020) (<https://www.oxygen.com/true-crime-buzz/surviving-r-kelly-who-are-sisters-lindsey-perryman-dunn-and-jen-emrich>) (noting that R. Kelly’s accusers have been characterized as desperate for money and fame and quoting one defender of R. Kelly who stated, “A lot of these women figured out if they say R. Kelly hurt them, they’ll get a book deal, they’ll get famous.”); Prachi Gupta, *Reporter Who Broke R. Kelly Sex Abuse Allegations: “Nobody Matters Less to Our Society Than Young Black Women”*, SALON.COM (Dec. 17, 2013)

([https://www.salon.com/2013/12/16/reporter\\_who\\_broke\\_r\\_kelly\\_sex\\_abuse\\_allegations\\_nobody\\_matters\\_less\\_to\\_our\\_society\\_than\\_young\\_black\\_women/](https://www.salon.com/2013/12/16/reporter_who_broke_r_kelly_sex_abuse_allegations_nobody_matters_less_to_our_society_than_young_black_women/)) (stating that R. Kelly’s accusers were described as “bitches, hos, and gold diggers”).

<sup>156</sup> See Daniel Kreps, *Chance the Rapper: ‘Making a Song with R. Kelly Was a Mistake’*, ROLLINGSTONE.COM (Jan. 5, 2019) (<https://www.rollingstone.com/music/music-news/chance-the-rapper-r-kelly-mistake-775431/>).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (internal quotations omitted). Chance also stated, “Usually, niggas that get in trouble for shit like this on their magnitude of celebrity, it’s light-skinned women or white women. That’s when it’s a big story. I’ve never really seen any pictures of R. Kelly’s accusers.” *Id.* Chance’s response suggests that a White or light-skinned Black woman would be more credible than a dark-skinned Black woman. Chance’s statement is an example of colorism, a term coined by Pulitzer Prize-winning author Alice Walker that can be defined as “prejudicial or preferential treatment of same-race people based solely on their color.” Kimberly Jade Norwood & Violeta Solonova Foreman, *The Ubiquitousness of Colorism: Then and Now*, in COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA 9, 9 (Kimberly Jade Norwood, ed., 2014). Chance implies that a dark-skinned woman might need to do more to convince police officers, prosecutors, and jurors that she was assaulted. In essence, she would be forced to overcome society’s assumption that she is not attractive enough to be raped. *Accord* text accompanying notes 107 through 108 (stating that slave

Chance's response suggests that the criminal justice system's history of racism against Black men impacts the believability of Black girls and women who accuse Black men of rape. The United States' history of racism is typified by the prevalence of lynching in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries.<sup>159</sup> Between 1882 and 1946, approximately 5,000 people were lynched in the United States, and about 75 percent of lynching victims were Black.<sup>160</sup> Many lynch mobs targeted Black men based on oftentimes false allegations that they had raped White women.<sup>161</sup> N. Jeremi Duru notes that lynchings occurred across the country, in both the North and the South, and were "spectacles often attended by large groups, sometimes thousands, many of whom enjoyed and took pride in the murders."<sup>162</sup>

The fear of lynching created terror in the Black community as accounts spread of White lynch mobs torturing, dismembering, and burning their victims alive.<sup>163</sup> In fact, the Black community understood that Black men were particularly vulnerable to lynching based on false allegations of rape "by white women who had engaged in consensual sex with former slaves but later found it expedient to deny it."<sup>164</sup> High profile proceedings such as the Scottsboro Cases were examples of "legal lynching" wherein false allegations of rape by White women resulted in Black men and boys serving many years in prison and sometimes being executed.<sup>165</sup>

One less apparent consequence of the country's mistreatment of Black men accused of rape was a reluctance on the part of Black women to report their own rapes. Describing the terror that existed in African-American communities during the lynching years, Broussard notes that crimes such as rape, incest, domestic violence and other offenses were underreported because Black women did not want to bring attention to Black men.<sup>166</sup> Black women's reluctance to subject Black men to the racism of the American justice system continues to impact the reporting of rape today, and many in the African-American community have come to expect and often demand that Black women preserve the image of

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owners were able to convincingly deny allegations of rape made by Black girls and women who fit the Mammy stereotype by asserting that they were not physically attracted to them).

<sup>159</sup> Lynching is defined as a "killing done by several people acting in concert outside the legal process to punish a person perceived to have violated a law or custom." RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 42 (1997).

<sup>160</sup> See Wriggins, *supra* note 11, at 107.

<sup>161</sup> See note 43, *supra*.

<sup>162</sup> N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315, 1326 (2004).

<sup>163</sup> See Wriggins, *supra* note 11, at 107-08.

<sup>164</sup> Cardyn, *supra* note 38, at 699.

<sup>165</sup> See Wriggins, *supra* note 11, at 109-10 (defining legal lynching as the legal system's mistreatment of Black men accused of raping White women and describing the Scottsboro cases of the 1930s); *id.* at 112-13 ("Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed. In stark contrast, only two percent of all defendants convicted of rape involving other racial combinations were executed.").

<sup>166</sup> See Broussard, *supra* note 98, at 407.

the race by remaining silent.<sup>167</sup> According to Broussard, Black women have been taught that they are first Black, then women.<sup>168</sup>

When a Black girl or woman reports that a Black man has raped her, she faces disbelief and skepticism from the larger society but also from members of her own community. Gill argues that many in the Black community view any Black man accused of rape as the victim and the Black accuser as someone who is helping to perpetuate the stereotype that all Black men are rapists.<sup>169</sup> She asserts that Black women who accuse Black men of rape “lose their place in the Black ‘family’ because of the conflict in the Black community caused by the intersection between gender and race.”<sup>170</sup> Crenshaw, who coined the term “intersectionality” to describe the unique form of discrimination Black women face when sexism and racism collide,<sup>171</sup> has found that the African-American community disregards and vilifies Black women who accuse Black men of rape because their accusations are viewed as a racist attack against Black men.<sup>172</sup> She provides the 1992 Mike Tyson rape trial as an example. Tyson was tried and convicted for raping an 18-year old Black woman named Desiree Washington.<sup>173</sup> Crenshaw notes that Tyson and his supporters advanced his claim of innocence by pushing for solidarity within the Black community.<sup>174</sup> In fact, some commentators directly compared Tyson to Black men who were lynched based on false allegations that they had raped White women.<sup>175</sup> Similarly, in response to allegations of sexual violence and exploitation against R. Kelly that resulted in formation of the #MuteRKelly movement, the singer’s management team released a statement that directly invoked the country’s history of lynching: “Since America was born, black men and women

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<sup>167</sup> *Id.* at 409 (stating that Black women remain silent about the sexual violence they have experienced not just out of shame, “but out of a need to preserve the race and its image. In our attempts to preserve racial pride, we [B]lack women have sacrificed our own souls.” (quoting CHARLOTTE PIERCE-BAKER, *SURVIVING THE SILENCE: BLACK WOMEN’S STORIES OF RAPE* 84 (1998)); Gill, *supra* note 147, at 43 (“Not surprisingly, the fear of not being believed, of racism against her, and of exposing a Black man to a racist criminal justice system may cause a Black rape victim not to report an incident of rape by a Black man.”).

<sup>168</sup> *Id.* at 412.

<sup>169</sup> See Gill, *supra* note 147, at 43.

<sup>170</sup> *Id.*

<sup>171</sup> Crenshaw, *supra* note 60, at 1244 (“[M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood . . . . [T]he intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”).

<sup>172</sup> *Id.* at 1273. Accord Crooms, *supra* note 124, at 483 (“Some commentators deftly cast Black women as villains who actively participate in the victimization of Black men. In particular, they denounce Black women who dare to problematize gender in the politics of Black liberation by speaking about issues such as intraracial sexual violence against Black women.”).

<sup>173</sup> See Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 1002.

<sup>174</sup> See Crenshaw, *supra* note 60, at 1273.

<sup>175</sup> See Crooms, *supra* note 124, at 488. Crooms describes a major flaw in this comparison – namely, that Tyson was accused of intraracial rape. She asserts that Tyson supporters who attempted to compare him to lynching victims failed to consider the fundamental question of whether a Black man had ever been lynched for allegedly raping a Black woman. *Id.*

have been lynched for having sex or for being accused of it. We will vigorously resist this attempted public lynching of a black man who has made extraordinary contributions to our culture.”<sup>176</sup> U.S. Supreme Court Justice Clarence Thomas and actor and comedian Bill Cosby have also described themselves as lynching victims in response to allegations of sexual violence and harassment.<sup>177</sup>

This strategic use of lynching imagery has an obvious impact on the credibility of Black girls and women who accuse Black men of sexual violence. The Black community views these girls and women as bad actors who want to bring down their own men. Indeed, for some in the African-American community, it is preferable for Black girls and women to remain silent about their legitimate claims of rape rather than subject a Black man to a racist criminal justice system. Describing the Black community’s response to the Tyson rape trial, Kevin Brown notes that many believed Tyson’s conviction was symbolic of the justice system’s unfair treatment of African-American men. Thus, “[t]o support Tyson then, is to fight against racial domination of African-Americans.”<sup>178</sup> Brown also describes a belief by some in the Black community that the fight against racial subordination was more important than the fight against the sexual subordination of African-American girls and women.<sup>179</sup> He describes the hierarchy in the following way:

Although it is true that a Sister had been raped by a Brother, Tyson was now a victim of racism in the criminal justice system. Despite the fact that Brothers certainly want to support Sisters, concerns about the Sisters must wait until after we have dealt with the Man (resolved the racial issue). Let us not forget, we have been trying to resolve the racial issue for over 370 years.<sup>180</sup>

In essence, the country’s history of racial injustice hurts the credibility of Black girls and women who make accusations of sexual violence against Black men, and, even where those accusations are deemed truthful, the risk of racial injustice pushes Black girls and women to remain silent about their experiences or face anger and scrutiny from their own community.

Sections I and II have explored the stereotypes and beliefs that affect society’s response when Black girls allege sexual violence. Section III will explore the extent to which these societal perceptions affect the players in the justice system, including police officers, judges, defense attorneys, jurors, and prosecutors.

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<sup>176</sup> Laura Snapes, *R Kelly: Time’s Up Campaign against Me is ‘Attempted Lynching of a Black Man’*, THEGUARDIAN.COM (May 1, 2018), <https://www.theguardian.com/music/2018/may/01/r-kelly-times-up-muterkelly>.

<sup>177</sup> See Julia Jacobs, *Anita Hill’s Testimony and Other Key moments from the Clarence Thomas Hearings*, NEW YORK TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html>; Kristen de Groot & Claudia Lauer, *Cosby Confined to His Home as Team Decries ‘Public Lynching’*, WASHINGTON POST (April 27, 2018), [https://www.washingtonpost.com/national/bill-cosby-americas-dad-convicted-of-drugging-sex-assault/2018/04/27/b898fd58-49d4-11e8-8082-105a446d19b8\\_story.html](https://www.washingtonpost.com/national/bill-cosby-americas-dad-convicted-of-drugging-sex-assault/2018/04/27/b898fd58-49d4-11e8-8082-105a446d19b8_story.html).

<sup>178</sup> Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 1002.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

### III. THE IMPACT OF RACE-BASED STEREOTYPES ON THE PLAYERS IN THE JUSTICE SYSTEM

While societal perceptions concerning the promiscuity and dishonesty of Black girls are troubling, it is necessary to consider whether these perceptions have permeated the justice system. As noted earlier, studies conducted in the 1960s and 1970s determined that law enforcement authorities were less likely to investigate and file charges in rape cases involving Black victims based on perceptions that they were more promiscuous and less truthful compared to White victims.<sup>181</sup> Similarly, research conducted in the 1980s found that jurors were less likely to believe Black rape accusers based on perceptions about their hypersexuality and tendency to lie.<sup>182</sup> More recent research suggests that despite a number of rape reform efforts that have reduced barriers to obtaining a rape conviction, Black women continue to experience discrimination when they seek recourse from the justice system.<sup>183</sup> Moreover, as a result of society's tendency to make Black girlhood interchangeable with Black womanhood,<sup>184</sup> Black girls also experience this discrimination.

A significant body of research concerning the justice system's perceptions of rape victims has focused the system's tendency to rely on rape myths. Morrison Torrey places the "classic" yet debunked rape myths into the following four categories: "(1) only women with 'bad' reputations are raped; (2) women are prone to [rape] fantasies; (3) women precipitate rape by their appearance and behavior; and – by far the most potent myth – (4) women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sexual relations."<sup>185</sup> Importantly, many of these myths track with slavery-era stereotypes that Black girls and women are inherently promiscuous (and therefore have bad reputations), cannot be raped or are not significantly affected by rape (perhaps because they fantasize about being raped), and have a tendency to falsely claim rape (perhaps because they are vengeful gold diggers seeking money). If it is true that police officers, judges, jurors, defense attorneys, and prosecutors rely on rape myths when assessing allegations of rape,

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<sup>181</sup> See text accompanying notes 135 through 137, *supra*.

<sup>182</sup> See text accompanying notes 140 through 143, *supra*.

<sup>183</sup> See Pokorak, *supra* note 10, at 35-36 (stating that while reform efforts have increased the likelihood that rape victims will receive equal treatment, "Black rape victims still suffer from discrimination merely because they are not White.").

<sup>184</sup> See Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 68 (2017) (citing GIRLHOOD INTERRUPTED, *supra* note 61).

<sup>185</sup> Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025, 1026 (1991). See also Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH. L. REV. 219, 230-31 (2016) (noting that rape myths also include the belief that women invite rape when they consume alcohol, that a genuine assault would be reported to police immediately, and that a real rape victim would fight back and therefore sustain some injury during the assault). Torrey argues that included within these four categories are a number of untrue beliefs and perceptions about rape, including the belief that women mean "yes" when they say "no", that women are "asking for it" when they wear certain clothing, that women derive pleasure from being raped, that most women who are raped are promiscuous, that a woman who goes home with a man is consenting to sex, and that women sometimes "cry rape" to cover up an illegitimate pregnancy or to get revenge. *Id.* at 1015.

then Black girls begin their journey through the justice system in a much worse position than their White counterparts.

Several studies confirm that the players in the justice system rely on rape myths, including stereotypes based on race, and that, when they do, rape victims experience unfair treatment. Section A will discuss research demonstrating that police officers, judges, defense attorneys, and jurors accept as true certain disproven stereotypes and perceptions about rape victims. I have reserved Section B for a discussion of the most powerful player in the justice system – the prosecutor.<sup>186</sup> Prosecutors’ power lies in their nearly unchecked discretion to file charges.<sup>187</sup> Thus, prosecutors who buy into societal stereotypes concerning Black girls can immediately cut off a victim’s access to justice and allow a rapist to walk free.

A. The Influence of Rape Myths and Stereotypes on Police Officers, Judges, Defense Attorneys, and Jurors

Like other members of society, police officers often assess rape allegations using rape myths that include race-based stereotypes about rape victims. In a 2017 study that sought to determine how often traditional rape myths appeared in the official police records of sexual assault investigations, researchers found that “police routinely invoke rape myths regarding what real rape looks like, who can be raped, and who is to blame.”<sup>188</sup> The study found that police records often included statements assessing the victim’s credibility, such as comments that a victim was promiscuous or had a bad reputation.<sup>189</sup> Researchers determined that police officers’ attitudes toward rape victims can impact their investigative practices and concluded that rape myths influence police officers on an “implicit” and “undetectable” level.<sup>190</sup> Similarly, a 2016 study found that adolescent sexual assault victims often perceive police officers as responding to their allegations with skepticism and victim blaming.<sup>191</sup> The researchers noted that these attitudes appeared to be more prevalent where police officers viewed the victim as a “bad teenager” based on behavior unrelated to the assault or victim character traits such as ethnicity.<sup>192</sup> The study concluded that the perceived victim-blaming and skepticism of police officers could result in less thorough investigations as well as victims’ refusal to cooperate with police.<sup>193</sup>

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<sup>186</sup> See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 18 (1998) (“Through the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime. I suggest that this discretion, which is almost always exercised in private, gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve.”).

<sup>187</sup> *Id.*

<sup>188</sup> Jessica Shaw, et al., *Beyond Scales and Surveys: How Rape Myths Manifest in Sexual Assault Police Records*, 7 *PSYCH. OF VIOL.* 602, 602, 610 (2017).

<sup>189</sup> *Id.* at 610.

<sup>190</sup> *Id.*

<sup>191</sup> See Megan R. Greeson, et al., “*Nobody Deserves This*”: Adolescent Sexual Assault Victims’ Perceptions of Disbelief and Victim Blame from Police, 44 *J. OF COMM. PSYCH.* 90, 106-07 (2016).

<sup>192</sup> *Id.* at 105-06.

<sup>193</sup> *Id.* at 106-07.

While contemporary research on judges' attitudes toward rape victims is scant, studies dating back to the 1970s and 1980s reveal that judges often adopt and reinforce rape myths.<sup>194</sup> In a study of judges in the city of Philadelphia, researchers found that they had a tendency to classify acquaintance rape as consensual.<sup>195</sup> These judges also tended to believe that women often make false rape allegations to get even with a man.<sup>196</sup> A study of Indianapolis judges found that they hold stereotypical beliefs about rape victims, with one judge expressing his opinion that a girl is "asking for" rape if she is well-endowed, goes to a bar, and consumes alcohol.<sup>197</sup>

Moreover, defense attorneys, who are tasked with mounting the best defense possible to a charge of rape or other sexual violence, often promote rape myths and stereotypes in an effort to impeach the credibility of alleged victims. Because rape cases typically lack physical evidence or eyewitness testimony, case outcomes often turn on the credibility of the accuser.<sup>198</sup> Defense attorneys put victims on trial by perpetuating racial, gender, or cultural stereotypes with an understanding that "legal and factual argument often persuades to the degree it piggybacks on the existing prejudices of a listener."<sup>199</sup> Additionally, attorneys sometimes discredit witnesses by "othering" them. "Othering" is defined as "a process by which individuals and society view and label people who are different in a way that devalues them."<sup>200</sup> To the extent defense attorneys can convince jurors that the rape victim is not like them, defense attorneys can impair the victim's credibility by putting distance between the jury and the rape victim.<sup>201</sup> At times, defense attorneys have successfully "othered" witnesses by using racial stereotypes.<sup>202</sup> In rape cases, counsel's subtle use of stereotypes concerning the promiscuity and dishonesty of Black rape victims might increase the likelihood of an acquittal.

Defense attorneys' assumptions about jurors' use of rape myths and stereotypes have proven to be true. As stated earlier, one of the jurors who voted to acquit R. Kelly on charges of child pornography in 2008 appeared to assess the credibility of the singer's alleged victims based on racial stereotypes and rape myths.<sup>203</sup> Research suggests that jurors commonly rely on rape myths and racial stereotypes. Consistent with LaFree's findings in the early 1980s

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<sup>194</sup> See Torrey, *supra* note 185, at 1056.

<sup>195</sup> *Id.* at 1056.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1057.

<sup>198</sup> See Cassia Spohn & David Holleran, PROSECUTING SEXUAL ASSAULT: A COMPARISON OF CHARGING DECISIONS IN SEXUAL ASSAULT CASES INVOLVING STRANGERS, ACQUAINTANCES, AND INTIMATE PARTNERS at III-5-3, <https://www.ncjrs.gov/pdffiles1/nij/199720.pdf> (2004) ("In [sexual assault] cases, little physical evidence may be present to connect the suspect to the crime, and typically eyewitnesses who can corroborate the victim's testimony may not be available. The likelihood of conviction depends primarily on the victim's ability to articulate what happened and to convince a judge or jury that a sexual assault occurred.").

<sup>199</sup> See Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 1 (1994).

<sup>200</sup> Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

<sup>201</sup> See Thompson, *supra* note 114, at 1263.

<sup>202</sup> *Id.* at 1264 (describing the othering of a Black witness by defense counsel during the *State of Florida v. George Zimmerman* trial).

<sup>203</sup> See text accompanying note 4, *supra*.

that White, middle-class jurors are less likely to believe a Black rape victim's allegations due to the impact of racial stereotypes,<sup>204</sup> other studies conducted in the latter part of the 20<sup>th</sup> Century found that White jurors generally perceive Black crime victims to be less truthful than other victims.<sup>205</sup> More recent research suggests that rape myths, including perceptions about a victim's manner of dress and sexual history, influence juror decision-making.<sup>206</sup> Jurors who believe in rape myths will seek out stereotype-consistent information and disregard information that is inconsistent with rape myths and stereotypes.<sup>207</sup> Additionally, the activation of racial and ethnic stereotypes in jurors affects their ability to recall stereotype-inconsistent evidence.<sup>208</sup>

As disturbing as it is to acknowledge the possibility that police officers, judges, defense attorneys, and jurors employ rape myths and racial stereotypes, the use of such misinformation by prosecutors could have the most devastating impact on Black girls.

#### B. The Influence of Rape Myths and Stereotypes on Prosecutors

Prosecutors possess significant discretion to make charging and plea negotiation decisions and determine the range of punishment for a crime, and this discretion is nearly unreviewable.<sup>209</sup> The U.S. Supreme Court has defined prosecutorial discretion in the following way: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."<sup>210</sup> Generally, prosecutors are not required to justify their charging decisions and a court will not question a prosecutor's exercise of discretion unless some evidence exists that the prosecutor has made decisions with a discriminatory motive.<sup>211</sup>

While prosecutors wield significant discretion, they also face pressure to win their cases. Head prosecutors are often elected, and even for those who are not, they can best show their effectiveness by obtaining convictions.<sup>212</sup> As Tamara Rice Lave notes, a 2015

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<sup>204</sup> See text accompanying notes 140 through 143, *supra*.

<sup>205</sup> See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1635 (1985).

<sup>206</sup> See Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH L. REV. 219, 231 ("The power of rape myths is not mere conjecture; studies have shown that they impact mock jurors and prosecutors.").

<sup>207</sup> See Meagen M. Hildebrand and Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1075 (2014-2015) ("Specifically, we suggest that exposure to rape culture increases the likelihood that jurors will endorse rape myths and view women as sex objects and, in turn, attend to schema and script consistent denials and justifications put forth by alleged perpetrators, while simultaneously ignoring contradictory evidence.").

<sup>208</sup> *Id.*

<sup>209</sup> See Pokorak, *supra* note 10, at 43 ("The fate of those caught up in the criminal justice system lies in the hands of prosecutors. The prosecutor exercises near unlimited power to determine the charge, to offer plea bargains and to determine the severity of punishment. This extensive authority is exercised out of public view, without objective criteria, and is essentially not reviewable.").

<sup>210</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>211</sup> See Davis, *supra* note 186, at 38, 40 (citing cases).

<sup>212</sup> Lave, *supra* note 206, at 229-30.

amendment to the ABA's professional standards for prosecutors states that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."<sup>213</sup> In essence, public pressure and ethical rules require prosecutors to exercise their discretion in a manner that will ensure a conviction.

In sexual assault and rape cases, a prosecutor's focus on convictability results in what Lisa Frohmann has termed a "downstream orientation" in prosecutorial decision-making.<sup>214</sup> Frohmann argues that prosecutors make charging decisions in anticipation of how a jury and defense attorneys will view the case.<sup>215</sup> Prosecutors anticipate defense arguments as well as jurors' likely view of the evidence, and if prosecutors believe that a conviction is unlikely, then they will reject the case.<sup>216</sup> Frohmann found that prosecutors' downstream orientation results in them rejecting rape cases where the victim was likely raped but the chance of conviction is low due to anticipated juror biases.<sup>217</sup>

Prosecutors' focus on convictability causes them to scrutinize more closely rape allegations that deviate from the prototypical rape, which Pokorak defines as "the kidnapping and forcible penetration of one White woman by one stranger who is a Black male."<sup>218</sup> He argues that any departures from the prototypical rape (e.g., the victim and assailant are not strangers, the victim is Black, or the assailant is White) make the case less prosecution-worthy.<sup>219</sup> To determine the likelihood of a conviction, prosecutors "create an image, not of a *typical* rape victim, but of a *genuine* rape victim."<sup>220</sup> They are more likely to reject cases involving victims whose characteristics and behavior differ from the image of a genuine rape victim, particularly in cases where the victim would be required to provide credible testimony.<sup>221</sup> Thus, prosecutors employ rape myths and stereotypes to make charging decisions even when they are not personally influenced by them.<sup>222</sup>

Moreover, researchers have found that victim race significantly affects prosecutors' exercise of their discretion. A 2001 study of prosecutors in Kansas City and Philadelphia found that they were four and one-half times more likely to file charges in stranger sexual assault cases when the victim was a White woman as compared to cases where the victim

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<sup>213</sup> AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.3(a) (2015) (cited in Lave, *supra* note 206, at 226).

<sup>214</sup> See Lisa Frohmann, *Convictability in Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC. REV. 531, 535 (1997).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 536.

<sup>217</sup> *Id.* at 536-37.

<sup>218</sup> Pokorak, *supra* note 10, at 39.

<sup>219</sup> *Id.* See also Oberman, *supra* note 73, at 752 ("Prosecutors concerned with rationing scarce criminal justice resources, as well as with securing convictions, will bring their own perceptions of consensual sex and/or their sense of a prospective juries' perceptions of 'harmful' sex, to bear in determining when and whether a [statutory rape] prosecution should take place.").

<sup>220</sup> Cassia Spohn, et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROB. 206, 233 (2001) (emphasis in original).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* ("[P]rosecutors continue to use a decision making calculus that incorporates stereotypes of real rape and legitimate victims.").

was a Black woman.<sup>223</sup> Researchers surmised that this disparity exists because today's prosecutors, like slavery-era courts and lawmakers, "view aggravated sexual assaults on white women as particularly serious."<sup>224</sup> Along the same lines, Frohmann's study of prosecutors found that they often use class and race distinctions between victims and potential jurors to justify case rejections, believing that jurors' misinterpretations of race and class differences will result in acquittals.<sup>225</sup> Frohmann argues that prosecutors who take this approach "reinforce the idea that social arrangements organized around race and class are 'natural', which in turn reifies the differences and misunderstandings."<sup>226</sup> This research makes clear that prosecutors serve as gatekeepers to the justice system for Black girls who experience sexual assault and rape. By allowing traditional race and gender stereotypes to affect their decisions, prosecutors carry forward and nourish a system of differential treatment that has plagued Black girls since our country's founding.

Thus far, this Article has shown that slavery-era stereotypes concerning Black girls continue to impact American society as well as the players in the justice system. The Article will conclude with some thoughts on the steps the justice system should take to remove the barriers Black girls encounter when they make allegations of sexual assault and rape.

#### IV. A SOLUTION CENTERED ON LAW ENFORCEMENT

Every player in the justice system should understand the ways in which racial stereotypes and rape myths affect outcomes in sexual assault cases, but because police officers are present at the origin of any sexual assault investigation and prosecutors play the most impactful role in the system, the solutions proposed in this Section focus on police officers and prosecutors. Regarding the other players in the justice system, I envision a "train the trainer" model wherein prosecutors will become equipped to educate judges and jurors on the ill effects of stereotypic decision-making in sexual assault and rape cases involving Black girls.

##### A. Bias Training

The U.S. Department of Justice and several local and state prosecutor's offices have begun to mandate implicit bias training for prosecutors and law enforcement officers, but they must do more to combat the effects of racial stereotypes and rape myths. In June of 2016, the Department of Justice announced that it would provide implicit bias training for its 23,000 law enforcement officers and 5,800 attorneys across its 94 U.S. Attorney's

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<sup>223</sup> See Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 671, 680-81 (2001). *Accord* *Prosecutorial Justifications*, *supra* note 220, at 224, tbl. 3 (finding that Miami-Dade County prosecutors rejected 58.1 percent of sexual battery cases involving Black victims but only 31.1 percent involving White victims).

<sup>224</sup> *Id.* at 681. See also Section I.A., *supra* (describing slavery-era laws that defined rape as a crime only when the victim was White).

<sup>225</sup> See Frohmann, *supra* note 214, at 552.

<sup>226</sup> *Id.* at 553.

offices.<sup>227</sup> The DOJ's announcement explained that all members of society harbor implicit biases, which it defined as "the unconscious and often subtle associations we make between groups of people and stereotypes about those groups."<sup>228</sup> The DOJ noted that the existence of such bias is especially challenging in the context of law enforcement "because it can alter where investigators and prosecutors look for evidence and how they analyze it without their awareness or ability to compensate."<sup>229</sup> Media reports indicate that the DOJ implemented the training following a spate of shootings of unarmed African-American men by White police officers.<sup>230</sup> A number of county and municipal district attorney offices have also mandated implicit bias training for their staff members, including DA's offices in San Francisco, California,<sup>231</sup> DeKalb County, Georgia,<sup>232</sup> and Boulder County, Colorado.<sup>233</sup> Additionally, implicit bias training is widespread among local police departments. As of August 2019, more than 100 police departments surveyed by CBS News had implemented some form of implicit racial bias training.<sup>234</sup>

While I support these very important efforts, I am concerned that current training programs likely focus on the mistreatment of African-American men without considering the intersectional bias Black female crime victims experience.<sup>235</sup> Moreover, while the DOJ has

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<sup>227</sup> See Sally Q. Yates, *Memorandum for All Department Law Enforcement Agents and Prosecutors* at 2 (June 27, 2016) (<https://www.justice.gov/opa/file/871116/download>).

<sup>228</sup> *Id.* at 1.

<sup>229</sup> *Id.*

<sup>230</sup> See, e.g., Julia Edwards, *Justice Dept. Mandates "Implicit Bias" Training for Agents, Lawyers*, REUTERS.COM (June 27, 2016) (<https://www.reuters.com/article/us-usa-justice-bias-exclusive-idUSKCN0ZD251>).

<sup>231</sup> See San Francisco District Attorney's Office, *Implicit Bias Training and Workshop*, <https://sfdistrictattorney.org/implicit-bias-training-and-workgroup> (last visited Mar. 25, 2020) (stating that in 2016, members of the San Francisco District Attorney's Office "were led through interactive exercises to show that visual markers—race, age, class, perceived sexual orientation, and gender, among others—can trigger internal processes in our brains to create positive emotions for some groups, and negative or no emotions at all for others.").

<sup>232</sup> See Bill Rankin, *DeKalb DA Takes Action to Rid Her Office of Implicit Bias*, ATLANTA JOURNAL-CONSTITUTION, (Aug. 29, 2019) <https://www.ajc.com/news/local/dekalb-takes-action-rid-her-office-implicit-bias/jBRb9uV3z9g8mpKl3eNzYK/>.

<sup>233</sup> See Mitchell Byars, *Boulder County DA Gets Grant for Implicit Bias Training*, DENVERPOST.COM (Mar. 13, 2019).

<sup>234</sup> See *We Asked 155 Police Departments about Their Racial Bias Training. Here's What They Told Us.*, CBS NEWS (Aug. 7, 2019) <https://www.cbsnews.com/news/racial-bias-training-de-escalation-training-policing-in-america/>. Notably, the effectiveness of implicit bias training for police officers is debatable. Some critics argue that the training may inadvertently increase racial bias while others assert that implicit bias training could endanger officers' safety by encouraging them to hesitate in situations where they need to act immediately. See Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 164 (2016).

<sup>235</sup> See Byars, *supra* note 233 (stating that the Boulder County DA's grant will pay for training to help staff recognize when bias is affecting the assessment of defendants and understand racial trauma in the justice system). See also San Francisco District Attorney's Office, *Racial Disparity Study*, <https://sfdistrictattorney.org/racial-disparity-study> (last visited Mar. 25, 2020) (describing a study of the San Francisco District Attorney's Office that found racial disparities in the treatment of criminal defendants); *We Asked 155 Police Departments*, *supra* note 234 (noting that 57 percent

acknowledged the potential presence of gender bias in sexual assault and domestic violence investigations, including the ways in which intersectional identities may exacerbate this bias,<sup>236</sup> I am not aware of any law enforcement or prosecutorial training programs on either the state or federal level that seek to combat intersectional bias against sexual assault and rape victims. Such training should include education on racial stereotypes, rape myths, and intra-community factors that sometimes result in victims' reluctance to cooperate with law enforcement authorities.<sup>237</sup> This training would also address society's tendency to view Black girls as adult women and the impact that this adultification can have on sexual violence investigations and prosecutions.<sup>238</sup>

## B. Training on Courtroom Practices

Many prosecutors would assert that they are all too familiar with the biases Black girls and women face when they come forward with allegations sexual violence. To be sure, researchers have found that prosecutors often reject cases not because harbor intersectional biases but because they are fearful that jurors' biases will result in acquittals.<sup>239</sup> Therefore, in addition to training that educates prosecutors on the presence of these biases, the DOJ and state and local district attorney's offices must train their prosecutors to anticipate and navigate the biases of other players in the justice system.

While this training should include a discussion of voir dire questioning that is effective in ferreting out biased jurors<sup>240</sup> and the crafting of jury instructions that explicitly discuss racial stereotypes,<sup>241</sup> the most impactful aspect of the training would concern the effective use of expert testimony to educate jurors on the prevalence of intersectional bias in sexual assault cases involving Black girls. Some courts have admitted expert testimony on the prevalence of implicit bias,<sup>242</sup> and many have allowed prosecutors to combat popular

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of surveyed police departments implemented implicit bias training after Michael Brown was killed by a police officer in Ferguson, Missouri and finding that 75 percent of surveyed police departments changed their training practices following a number of controversial use of force incidents).

<sup>236</sup> See U.S. Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* at 7, <https://www.justice.gov/opa/pr/justice-department-issues-guidance-identifying-and-preventing-gender-bias-law-enforcement> (Dec. 15, 2015) ("Explicit and implicit biases, including stereotypes about gender roles, sexual assault, and domestic violence, are embedded in our culture and can affect people in all different professions. With respect to policing, these biases may affect law enforcement officers' perceptions of sexual assault and domestic violence incidents and prevent them from effectively handling allegations of these crimes. The intersection of racial and gender stereotypes and biases can also pose unique difficulties for women and LGBT individuals of color seeking police services to address sexual assault and domestic violence incidents.").

<sup>237</sup> See Sections I through III, *supra*.

<sup>238</sup> See text accompanying notes 61 through 72, *supra*.

<sup>239</sup> See Section III.B, *supra*.

<sup>240</sup> See Thompson, *supra* note 114, at 1297-1300 (proposing the use of a voir dire questionnaire that encourages venire persons to disclose their biases).

<sup>241</sup> *Id.* at 1300-06.

<sup>242</sup> See, e.g., *Samaha v. Washington State Dept. of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, \*4 (E.D. Wash. Jan. 3, 2012) (admitting expert testimony on implicit bias in an

rape myths using expert testimony on rape trauma syndrome.<sup>243</sup> Blanche Cook argues for the use of expert testimony in sex trafficking and intraracial sexual assault cases in order focus jurors' attention on the defendant's rather than the victim's conduct: "Expert testimony may sanitize the victim's testimony from the taint of racism, sexism, and classism, which may take the form of victim blaming, hypersexualizing the victim, and immunizing the defendant through 'the slut defense.'"<sup>244</sup>

In sexual violence cases involving Black girls, prosecutors should also consider the use of expert testimony regarding adultification. Adultification bias is a form of implicit bias that reflects traditional and modern-day misconceptions about Black girls.<sup>245</sup> Like other forms of expert testimony that provide information outside the ordinary understanding of lay jurors,<sup>246</sup> testimony on adultification would provide jurors with a better lens through which to view the evidence offered at trial. Importantly, the strategic use of expert testimony in these cases is an essential tool for a prosecutor who might otherwise reject a case because of anticipated juror bias.<sup>247</sup>

## CONCLUSION

It should come as no surprise that the institution of slavery, which predated the founding of our country and existed for hundreds of years, would continue to affect American society today, but it is this acknowledgement of slavery's continued influence on our country that is often fodder for debate. In a sense, I understand the difficulty one might have in squaring her belief that America was founded on principles of freedom and liberty with the reality that our country's centuries-long denial of rights to certain members of society has resulted in an ongoing disadvantage for those individuals.

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employment discrimination case). *But see* Jackson v. Scripps Media, Inc., No. 18-00440-CV-W-ODS, 2019 WL 6619859, \*6 (W.D. Mo. Dec. 5, 2019) (excluding expert testimony on implicit bias because it would not help the jury determine whether defendant intentionally discriminated against former employee).

<sup>243</sup> See, e.g., People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990) ("Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970's, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror. For that reason, we conclude that introduction of expert testimony describing rape trauma syndrome may under certain circumstances assist a lay jury in deciding issues in a rape trial."). The recent trials of Bill Cosby and Harvey Weinstein featured expert testimony on rape myths, including the misconception that a delay in reporting signals that the rape allegation is false. See Chris Francescani, *Expert Witness Details 'Rape Myths' in Harvey Weinstein Case*, ABC NEWS (Jan. 24, 2020) (<https://abcnews.go.com/US/expert-witness-details-rape-myths-harvey-weinstein-case/story?id=68504135>).

<sup>244</sup> Blanche Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 211 (2019).

<sup>245</sup> See text accompanying notes 61 through 72, *supra*.

<sup>246</sup> See FED. R. EVID. 702(a) (stating that expert testimony is admissible where it is based on "scientific, technical, or other specialized knowledge" and "will help the trier of fact to understand the evidence or to determine a fact in issue").

<sup>247</sup> The potential admissibility of expert testimony on adultification bias pursuant to the rules of evidence is a topic for future research.

This Article has addressed just one slavery-era phenomenon that remains today. Despite the law's stated goal of protecting all citizens equally, perceptions and stereotypes about Black girls that thrived during slavery have resulted in a modern-day hierarchy of protection under the law. This hierarchy can explain why an accused sexual predator like R. Kelly was able to avoid criminal conviction and public ridicule for so long. It also explains why Kelly was embraced by many in the Black community even though he was accused of exploiting the most vulnerable members of that community— its children.

More than anything, this Article is a mea culpa to all of the fast girls who have gone unprotected. As a girl, I wanted to avoid being perceived as fast because I had learned that fast girls were at least partially responsible for the sexual violence committed against them. I did not want the wrong type of attention from boys and men, and I believed that dressing and behaving in a certain way would invite that attention. Like other members of society, I blamed the girls who were victimized and gave a “free pass” to the boys and men who harmed them. Although I lost some of my girlhood by working to avoid being fast, my and others' judgments of fast girls continues to deprive them of something more. They have lost the opportunity to live, learn, and grow freely before being forced to take on the obligations of adulthood, and society, including the justice system, has done very little to protect their innocence. Moving forward, we all must do much more to safeguard our children regardless of their race and sex.