

# THE (DE)VALUATION OF BLACK WOMEN'S BODIES

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## ABSTRACT

*In recent years, the tragic stories of Chrystul Kizer and Cyntoia Brown have entered the national stage. Their stories, and many others, have brought the devaluation of Black and brown women's bodies in the criminal justice system to the forefront of American discourse. Through their stories, this paper analyzes Black women's place in society from a historical and sociological perspective. With the rise of media attention on longstanding injustices affecting the Black community, it appears that societal discourse is evolving. However, to move forward, we must first understand the social framework that currently exists. The main objective of this paper is to provide historical context and illustrate how the criminal justice system continually hypersexualizes and devalues Black women's bodies. Despite the facially race-neutral language of criminal justice statutes, many laws do not consider Black women's various intersectional identities. Ultimately, these laws cannot adequately protect Black women. I finally posit that, to truly succeed in achieving a criminal justice system that protects all victims, any reform efforts must be led by Black women themselves.*

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## INTRODUCTION

In June 2018, seventeen-year-old Chrystul Kizer allegedly shot and killed the man who had been trafficking her for a year.<sup>1</sup> She was subsequently arrested and charged with first-degree intentional homicide.<sup>2</sup> If con-

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<sup>1</sup> See Jessica Contrera, *He was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder/> [<https://perma.cc/MD4X-5DPH>].

<sup>2</sup> *Id.*

victed she could spend most of her adult life in prison.<sup>3</sup> Ms. Kizer hoped the trial judge would permit her to assert Wisconsin's trafficking-related affirmative defense, codified in Wis. Stat. Ann. § 939.46(1m),<sup>4</sup> which allows trafficking victims to offer evidence that they committed their charged offense as a direct result of their victimization and thus negates the legal consequences of conviction. However, during preliminary hearings, the trial judge in Ms. Kizer's case denied her access to the affirmative defense under a narrow reading, holding that the statute was never meant to be applied in cases of homicide or violent crimes.<sup>5</sup> In direct contravention of the intent of Wisconsin legislators<sup>6</sup> and the language of the statute,<sup>7</sup> the judge ruled that interpreting this statute broadly would yield "absurd" results.<sup>8</sup> Though this issue is still on appeal in the Wisconsin Court of Appeals at the time of publication, if she cannot assert the §939.46(1m) defense during her trial, a conviction of first degree intentional homicide could result in a long prison sentence.<sup>9</sup>

Ms. Kizer's case is shocking, but it is unfortunately not unique. Consider the case of Cyntoia Brown. When Ms. Brown was sixteen years old, she killed a forty-three-year-old man who threatened to attack her after he

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<sup>3</sup> *Id.* While preparing her appeal to the Wisconsin Court of Appeals, Ms. Kizer was released from custody on June 22, 2020 after the Chicago Community Bond Fund paid her \$400,000 bond. Ms. Kizer had served almost two years in custody. See Jacey Fortin, *Chrystul Kizer, Teen Charged with Killing Sexual Abuser, is Released on Bond*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/chrystul-kizer-free-bond.html> [https://perma.cc/QQK2-KKZM].

<sup>4</sup> "A victim of a violation of § 940.302(2) or § 948.051 has an affirmative defense for any offense committed as a direct result of the violation of § 940.302(2) or § 948.051 without regard to whether anyone was prosecuted or convicted for the violation of § 940.302(2) or § 948.051." WIS. STAT. § 939.46(1m) (2012). The affirmative defense was codified in Wisconsin's statute for coercion as a defense. *Id.*

<sup>5</sup> See Order of Interpretation and Use of the Affirmative Defense Under §939.46(1m) at 1, *State v. Kizer*, No. 10 CF 683 (Kenosha Cnty. Cir. Ct. Jan. 23, 2020). The affirmative defense statute has never been used in a case of homicide or any other violent crime in Wisconsin, or likely in any other state with a similar statute. See Contrera, *supra* note 1.

<sup>6</sup> See Brief for Legal Momentum and Harvard Law School's Gender Violence Program as Amici Curiae Supporting Defendant-Appellant at 10, *State v. Kizer, appeal docketed*, No. 2020AP000192-CR (Wis. Ct. App. Mar. 2, 2020) (arguing that while the legislature could have adopted the language of other States' statutes, it instead decided not to limit §939.46(1m) to certain offenses, such as prostitution).

<sup>7</sup> Victims of human trafficking have an affirmative defense for "any offense" committed as a direct result of trafficking. See WIS. STAT. § 939.46(1m) (2012).

<sup>8</sup> See Contrera, *supra* note 1.

<sup>9</sup> WIS. STAT. § 940.01 (2012) classifies first-degree intentional homicide as a Class A felony. The penalty for a Class A felony conviction in Wisconsin is life imprisonment. WIS. STAT. §939.50(3)(a) (2012). Author's note: after completion of this Note, the Wisconsin Appellate Court released its decision on the matter, reversing the decision of the lower court and holding that Wis. Stat. § 939.46(1m) does in fact include *any offense* committed as a *direct result* of the person's trafficking victim status. However, it will still be the decision of the trial court on remand to determine if the defense is applicable in Ms. Kizer's case. See *Sate v. Kizer*, No. 2020AP000192-CR (Wis. Ct. App. June 2, 2021).

had paid to rape her.<sup>10</sup> After Ms. Brown served 15 years of a life sentence for first-degree murder, Tennessee Governor Bill Haslam granted her clemency.<sup>11</sup> The stories of Chrystul Kizer and Cyntoia Brown encapsulate a greater trend in the criminal justice system regarding the treatment of Black and brown girls. The criminal justice system's policies regarding sexually exploited children are rife with racial disparities and biases.<sup>12</sup> Black girls are not seen as victims of sexual abuse. Instead, police officers and prosecutors often view Black girls as complicit in their own exploitation despite the fact that they are not yet old enough to consent.<sup>13</sup> Furthermore, the criminal justice system tends to perceive victims of sex trafficking as more culpable than the men who purchase their bodies or the men who traffic them.<sup>14</sup> One study showed that sexually exploited minors are six times more likely than their exploiters to be arrested.<sup>15</sup> The question is: why are we punishing these young victims instead of protecting them from their abusers?

This paper discusses the historic devaluation of Black women's bodies and further details how that particular discrimination has impacted the current criminal justice system's failure to protect Black women and girls. Despite the facially race-neutral language of criminal justice statutes, many laws are not created with the consideration of various intersectional identities and are thus not able to protect everyone. This failure to protect Black women stems from American society historically determining each person's relative value based on their place in what Isabel Wilkerson has termed the American caste system.<sup>16</sup> In *Caste: The Origins of Our Discontents*, Wilkerson defines the caste system in America as "the operating system for economic, political, and social interaction in the United States" from the time of its inception.<sup>17</sup> This caste system, the origins of which Wilkerson credits to slavery, created a ladder of humanity in which English Protestants were the upper rung, and every other group of people would rank in descending order

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<sup>10</sup> See Christine Hauser, *Cyntoia Brown is Freed from Prison in Tennessee*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/cyntoia-brown-release.html> [<https://perma.cc/B4QT-WV4B>]. In Cyntoia Brown's case, the decedent could potentially have been charged with aggravated statutory rape because she was under eighteen and he was more than ten years her elder. See TENN. CODE ANN. § 39-13-506(c) (2010); see also Hauser, *supra* note 10. By definition, a sixteen-year-old cannot consent to sex in the state of Tennessee. Engaging in sexual intercourse with a sixteen-year-old, when the person in question is at least four years older, is automatically statutory rape. See TENN. ST. § 39-13-506 (2010). Aggravated statutory rape is a Class D felony in Tennessee. TENN. CODE ANN. § 39-13-506(d)(3) (2010).

<sup>11</sup> Hauser, *supra* note 10.

<sup>12</sup> See Priscilla A. Ocen, *(E)Racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1591 (2015).

<sup>13</sup> *Id.* at 1631.

<sup>14</sup> See *id.* (citing a New York City study that found sexually exploited minors to be six times more likely than their exploiters to be arrested).

<sup>15</sup> *Id.*

<sup>16</sup> See ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 17 (2020).

<sup>17</sup> *Id.* at 24.

on the basis of their proximity to the superior caste.<sup>18</sup> African captives and their descendants became the perpetual bottom rung.<sup>19</sup>

Historically, race, gender, and other identities of Black women have led them to be the people least valued by society.<sup>20</sup> This Note posits that the devaluation of Black women's bodies is a social construct created over hundreds of years that is still present in the criminal justice system today. Dating to the origins of chattel slavery, this enduring social construct has evolved over time so that social actors—primarily the superior caste of wealthy white men and the legal systems, legislatures, and media they control—continue to benefit from this construct. According to Wilkerson, a caste system relies on dehumanization to lock the marginalized outgroup outside of humanity so that any action against them is seen as reasonable.<sup>21</sup> Therefore, understanding the history of the dehumanization towards Black women helps to explain the extent to which the law is currently failing to protect them.

This Note proceeds in three parts. Part I explains the historical origins of the dehumanization of Black women and girls, detailing how slavery impacted the assessment of their current personal value as a result of their race and gender identity. Part II describes the hypersexualization of Black women in the post-slavery era and details how it has led to the modern disproportionate objectification and devaluation of Black bodies. Part III discusses how the criminal justice system has failed to protect these Black victims, forcing them to protect themselves. This section finishes with an analysis of the role that inherent bias has played in the criminal justice system and finally posits a way to begin to value the bodies, sexualities, and lives of Black women and girls.

## PART I: ORIGINS IN SLAVERY

The dehumanization of Black women originates in both slavery and the historical pattern of legally and socially viewing all women as property, regardless of race. Under slavery, a Black life was considered to be worth only a fraction of a human life—“the prevailing way of valuing lives assumed that some lives mattered more, were more human, more worthy, [and] more deserving of life and freedom.”<sup>22</sup> “The institution of slavery was, for a quarter millennium, the conversion of human beings into currency, into machines

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<sup>18</sup> *Id.* at 23.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *See id.* at 330–31 (using the 2016 election results to argue that the race and gender of African-American women place them at the bottom of the country's artificial hierarchy).

<sup>21</sup> *Id.* at 142.

<sup>22</sup> *See, e.g.,* George Yancy & Judith Butler, *Opinion, What's Wrong With 'All Lives Matter'?*, N.Y. TIMES (Jan. 12, 2015), <http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/> [<https://perma.cc/8PFB-WFUZ>].

who existed solely for the profit of their owners.”<sup>23</sup> The general premise of chattel slavery<sup>24</sup> is owning human beings and using them for work. Thus, the transatlantic slave trade made it a general practice to place a value on the slaves' bodies.<sup>25</sup> Various historians, such as Claire Robertson, Jacqueline Jones, and Edward E. Baptist have written that, in some instances, women slaves tended to be valued higher than their male counterparts because of the value placed not only on their ability to produce but also on their ability to reproduce.<sup>26</sup> As European men explored Africa, they often commented on the beauty of African women.<sup>27</sup> Slave traders recognized a unique beauty in African women, but they “perceived [this] beauty with the slave market in mind.”<sup>28</sup> These European colonizers created stereotypical traits of African women to dehumanize them in preparation for the exploitation and atrocities they would inflict upon them.<sup>29</sup> One of the most fascinating aspects of African women that these white men claimed to witness was the women's “rugged reproductive capacity.”<sup>30</sup> For instance, Charles Wheeler, an English trader who lived in Guinea for a decade in the early 1700s, commented on the ease with which he believed African women produced children.<sup>31</sup> He wrote that they had no need for midwives, doctors, or nurses; they would go to bed overnight, have a child, and be fine by noon.<sup>32</sup> The ability to tend to

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<sup>23</sup> WILKERSON, *supra* note 16, at 45.

<sup>24</sup> Dictionary.com defines chattel slavery as “the enslaving and owning of human beings and their offspring as property, able to be bought, sold, and forced to work without wages, as distinguished from other systems of forced, unpaid, or low-wage labor also considered to be slavery.” *Chattel Slavery*, DICTIONARY.COM, <https://www.dictionary.com/browse/chattel-slavery> [<https://perma.cc/Q9L4-L652>].

<sup>25</sup> See, e.g., Gregory E. O'Malley, *Slavery's Converging Ground: Charleston's Slave Trade as the Black Heart of the Lowcountry*, 74 WM. & MARY Q. 271, 295 (2017) (detailing the practice of grouping captives based on their physical attributes and the commodification of those characteristics).

<sup>26</sup> See Claire Robertson, *We Must Overcome: Genealogy and Evolution of Female Slavery in West Africa*, 1 J. WEST AFR. HIST. 59, 68 (2015); see also Jacqueline Jones, “My Mother Was Much of a Woman”: *Black Women, Work, and the Family under Slavery*, 8 FEMINIST STUD. 235, 245 (1982) (describing how Southern slaveowners walked a fine line between making use of a woman's productive capabilities and protecting their investment in women as childbearers); Edward E. Baptist, “Cuffy,” “Fancy Maids,” and “One-Eyed Men”: *Rape, Commodification, and the Domestic Slave Trade in the United States*, 106 AM. HIST. REV. 1619, 1640 (2001) (claiming that slave-owning white men “were all greedy for male and female labor in the fields and for reproductive labor in the slave quarters”).

<sup>27</sup> Stephanie M. H. Camp, *Early European Views of African Bodies: Beauty*, in *SEXUALITY & SLAVERY* 9, 12 (Daina Ramey Berry & Leslie M. Harris eds., 2018).

<sup>28</sup> *Id.* at 13.

<sup>29</sup> Cf. WILKERSON, *supra* note 16, at 142 (identifying the strategy of the superior castes in Nazi Germany and the Antebellum American South of lumping a group together through a single stigmatizing trait in preparation for the exploitation and atrocities that would be inflicted upon them).

<sup>30</sup> Camp, *supra* note 27, at 12.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

the field or perform other standard slave-related duties all while being able to increase the population made women slaves extremely valuable.<sup>33</sup>

Slaveowners considered their slaves to be both people and property.<sup>34</sup> However, “[their] priorities were clear: property first, humanity second.”<sup>35</sup> Society’s major players only appreciated a slave’s identity as a human being insofar as it affected the slave’s value to their owner.<sup>36</sup> Courts, for instance, recognized human relationships between slaves and their masters only because it increased the economic value of that slave to the master.<sup>37</sup> For enslaved women, their bodies “gained and lost value in terms of their ability to produce a new supply of workers to feed international demands for [valuable goods].”<sup>38</sup> The Black womb became a “profit center” in the sense that slavers could choose to impregnate women at will in order to make themselves richer.<sup>39</sup> For enslaved women, their bodies did not belong to themselves; instead, their bodies belonged to slaveowners to use according to their whims.<sup>40</sup> Black women’s valuation stemmed from chattel slavery and the commodification of their bodies, assessing their human value only in terms of the sexual and economic benefits their bodies could provide their owners.<sup>41</sup>

Slaveowners “recognized individual slaves as women when it suited them,” and as “[gender-neutral] ‘hands’” when that valuation was more beneficial for the master.<sup>42</sup> As Sojourner Truth aptly asks in “Ain’t I a woman?”,<sup>43</sup> how can the term “woman” include her—“a quantity, a productive non-human?”<sup>44</sup> She is a producer of surplus value; her body and work have been quantified for her master. Thus, “woman” was not, in Sojourner’s mind, a universal term that extended to the Black female bodies that were more property than human.<sup>45</sup> Black women workers suffered the same demanding physical labor as Black men and were required to use their reproductive and child-rearing capabilities to “enhance the quantity and quality of

<sup>33</sup> See Jones, *supra* note 26, at 238.

<sup>34</sup> See Chief Judge Ulysses Gene Thibodeaux, *The Louisiana Supreme Court and Civil Rights: A Fickle Courtship*, 60 LA. B.J. 484, 485 (2013).

<sup>35</sup> A. Leanon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave’s Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 514 (1989).

<sup>36</sup> See *id.* at 516.

<sup>37</sup> See *id.* at 515.

<sup>38</sup> Ellen Hartigan-O’Connor, *Gender’s Value in the History of Capitalism*, 36 J. EARLY REPUBLIC 613, 633–34 (2016).

<sup>39</sup> WILKERSON, *supra* note 16, at 106.

<sup>40</sup> *Id.* at 145.

<sup>41</sup> See Baptist, *supra* note 26, at 1649.

<sup>42</sup> Hartigan-O’Connor, *supra* note 38, at 633.

<sup>43</sup> Sojourner Truth, “Ain’t I A Woman?”, Address before the 1851 Women’s Convention in Akron, Ohio (1851).

<sup>44</sup> Marfa Lugones, *Gender and Universality in Colonial Methodology*, 8 CRITICAL PHIL. RACE 25, 35 (2020) (discussing Sojourner Truth’s “Ain’t I a Woman?” 1851 speech and the denial of the concept of humanity extended towards Black women).

<sup>45</sup> *Id.*

the 'capital' of a slave economy."<sup>46</sup> Slavery inflicted specific gendered forms of violence where Black women often found themselves in a vicious dichotomy, subject to a negative devaluation in society as a result of both their race and their sex.

"Compulsory sexual relations"<sup>47</sup> were a common characteristic of slavery for women. Sexual assault, in particular, greatly shaped the experiences of women slaves.<sup>48</sup> In addition to performing their arduous required duties, women slaves were often expected to be available for sexual use by their masters.<sup>49</sup> Compulsory sexual relations between slave masters and their enslaved female "property" were extremely common in the Antebellum South.<sup>50</sup> Especially in the Deep South, it was public knowledge that it was widespread practice for a master to maintain a relationship with one of his slaves.<sup>51</sup> These relations ranged from "rape and sodomy to romance. . . [and] from concubinage to even 'marriage.'"<sup>52</sup> Sexual relationships between a slaveowner and his female slave were so commonplace that the average Black person in the United States today has an ancestry that is about eighty percent African and twenty percent European—of which about eighty percent of the European ancestry is inherited from white males.<sup>53</sup> Furthermore, the prices of enslaved women demonstrate just how valuable their feminine "assets" were for their slaveholders.<sup>54</sup> The "fancy girl" and the "good breeding" women were extremely valuable.<sup>55</sup> These categories expressed the sexual commodification of enslaved women. The light skin and fertility of a woman slave could increase her value to four or five times the price of equivalent female field laborers.<sup>56</sup>

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<sup>46</sup> Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *SIGNS* 42, 47 (1988).

<sup>47</sup> See Robertson, *supra* note 26, at 69 (explaining that the compulsory sexual relations involved in slavery can most accurately be seen as rape).

<sup>48</sup> *Id.* (quoting Kevin Bales and Jody Sarich, *The Paradox of Women, Children, and Slavery in TRAFFICKING IN SLAVERY'S WAKE: LAW AND EXPERIENCE OF WOMEN AND CHILDREN IN AFRICA* 242–43 (Lawrance & Roberts, eds., 2012)).

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

<sup>50</sup> Brenda E. Stevenson, *What's Love Got to Do with It? Concubinage and Enslaved Women and Girls in the Antebellum South*, in *SEXUALITY & SLAVERY* 160–61 (Daina Ramey Berry & Leslie M. Harris eds., 2018).

<sup>51</sup> See *id.* at 161.

<sup>52</sup> *Id.*

<sup>53</sup> Douglas Preston, *The Skeletons at the Lake*, *NEW YORKER* (Dec. 14, 2020), <https://www.newyorker.com/magazine/2020/12/14/the-skeletons-at-the-lake> [https://perma.cc/B8QW-J98J] (citing percentages as genetic testimony to the widespread rape and sexual coercion of female slaves by slaveowners); see also HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 146 (2019) ("[O]ne in three African American males carries a Y-DNA signature inherited from a direct white male ancestor . . . [and] the average African American autosomal admixture is about 25 percent European. These startling results could only reflect the frequency of the rape of [B]lack women by white men during slavery.").

<sup>54</sup> Stevenson, *supra* note 50, at 165.

<sup>55</sup> *Id.*

<sup>56</sup> See Baptist, *supra* note 26, at 1642.

A slave woman's sexual relationship to her master, especially if she birthed his children, made her so valuable that her freedom became very improbable.<sup>57</sup> While it was common for slave owners to free their slaves upon death, if the slave was worth more than the disposable portion—the portion of the estate bequeathed to a non-heir<sup>58</sup>—of the deceased owner's estate then “she could not be freed and had to be included in the estate's assets for distribution.”<sup>59</sup> Consider, for example, the case *Vail v. Bird*.<sup>60</sup> When Vail died he emancipated his female slave, Jane, in his will.<sup>61</sup> Vail's heirs attacked the emancipation, stating that Jane was Vail's concubine and as such was considered immovable property.<sup>62</sup> As immovable property, she should not be entitled to freedom despite the decedent emancipating her in his will.<sup>63</sup> The court agreed with this argument, thus denying Jane her freedom.<sup>64</sup> Ironically, Jane's concubinage status made her exceedingly valuable to Vail's estate even though she could not participate in the profound human capacity to form consensual sexual relationships with others because the controllers of society—white, slaveholding men—had determined that she was dehumanized property.<sup>65</sup> In fact, her property status as a concubine made her so valuable that she was worth more than one-third of the entire Vail estate, thus prohibiting the court from acknowledging her humanity and donating her value to her, i.e., allowing her to inherit herself as property and become her own master.<sup>66</sup>

It is important to note that white women were also treated as property during this time period, albeit in different ways. Laws were extremely forthright about the status of women as men's property.<sup>67</sup> The historical development of rape law is the clearest example of this devaluation. The objective of rape statutes traditionally was to protect and maintain men's property interest

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<sup>57</sup> See Chief Judge Thibodeaux, *supra* note 34, at 485.

<sup>58</sup> In Louisiana probate law, the disposable portion of the estate is the portion of a person's property which they are free to dispose of by will to beneficiaries other than spouse and children. Typically, the disposable portion cannot amount to greater than one-half of the estate if the decedent is survived by both spouse and children. See LA. CIV. CODE ANN. Art. 1495.

<sup>59</sup> Chief Judge Thibodeaux, *supra* note 34, at 485.

<sup>60</sup> 6 La. Ann. 223 (La. 1851).

<sup>61</sup> *Id.* at 223.

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

<sup>63</sup> Chief Judge Thibodeaux, *supra* note 34, at 485.

<sup>64</sup> *Id.*

<sup>65</sup> See *id.*

<sup>66</sup> “A donation of a slave's value to them” was the Louisiana Supreme Court's way of defining when a slave owner freed his slaves in his will because the slave became someone who could inherit, but was also the property they themselves were inheriting. See *id.*

<sup>67</sup> Diane Rosenfeld, *Sexual Coercion, Patriarchal Violence and the Law*, in *SEXUAL COERCION IN PRIMATES AND HUMANS: AN EVOLUTIONARY PERSPECTIVE ON MALE AGGRESSION AGAINST FEMALES* 429 (Martin M. Muller & Richard W. Wrangham eds., 2009).

in a woman's chastity.<sup>68</sup> According to William Blackstone's *Commentaries on Law from 1765 – 1769*, rape was a crime of trespass to property.<sup>69</sup> The right to pursue a rape claim in the legal context was solely a right of the property owner—either the husband or the father of the white woman.<sup>70</sup> When a man raped a woman, the offense was against the man who had a property interest in her being.<sup>71</sup> Rape laws were “originally designed to secure a woman's value as a sexual object.”<sup>72</sup> Because chastity determined a woman's value, when a man raped a woman, she became less valuable.<sup>73</sup> The criminal system was largely unconcerned with rape and violence against women, but it would contemplate intervening only in the rape of white women.<sup>74</sup> By definition, it was legally impossible to rape a Black woman.<sup>75</sup> Because women were the property of men, men were permitted to do as they wished with their property. This fact was particularly true for slaves.

The increase in economic value based on a slave woman's sexual assets led to an inherent sexual objectification. Slaveholders were able to profit from the sexualization of their slaves.<sup>76</sup> The legal protections men enjoyed in sexually engaging with their “property” however they deemed fit, without recourse, further exacerbated the objectification of Black women.<sup>77</sup> As discussed in the next section, the perception of Black women as solely sexual beings and the economic benefits that stemmed from their sexuality persisted even after Black people gained their freedom. Perceiving Black women as solely sexual beings has led to the continued hypersexualization of Black women, resulting in the abuse of Black girls such as Chrystul Kizer.

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<sup>68</sup> See Kimberle Crenshaw, *De-marginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157 (1989).

<sup>69</sup> See Rosenfeld, *supra* note 67, at 431 (citing William Blackstone, *Commentaries on the Laws of England*, Book I (Oxford 1765 – 1769)).

<sup>70</sup> See *id.*

<sup>71</sup> *Id.*

<sup>72</sup> Abigail Andrews Tierney, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 781 (1986).

<sup>73</sup> See TABITHA KENLON, CONDUCT BOOKS AND THE HISTORY OF THE IDEAL WOMAN 93 (2020) (citing DR. JOHN GREGORY, A FATHER'S LEGACY TO HIS DAUGHTERS (1774)) (reiterating the prevailing view at the time that chastity determined a woman's value and it was the only thing in which men were interested).

<sup>74</sup> Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105–06 (1983) (comparing society's reactions to the rape of white women with the rape of Black women; e.g., indictments would be dismissed if they failed to specify that the victim was white).

<sup>75</sup> See, e.g., WILKERSON, *supra* note 16, at 153 (though rape was a felony during the slavery era and was seen as wrong, immoral, and reprehensible, the country allowed most any atrocity to be inflicted on the Black body); Wriggins, *supra* note 74, at 106 (the rape of Black women by white or Black men was legal).

<sup>76</sup> See generally Baptist, *supra* note 26 (discussing the slave-trading firm Franklin, Armfield, and Ballard's attempts to commodify slavers' view of female slaves as sexualized objects).

<sup>77</sup> See Wriggins, *supra* note 74, at 105–06.

Black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched in America centuries ago.<sup>78</sup>

## PART II: POST-SLAVERY: THE BLACK WOMAN AS JEZEBEL

Though chattel slavery ended in the United States in 1865, the perception of the Black woman as Jezebel—an alluring and seductive woman who is highly sexualized and is valued purely for her sexuality—is part of the persistent evolution of the devaluation of Black women’s bodies which endures to this day. The Jezebel image “arose during the slavery era as an explanation for slave owners’ sexual attraction to and sexual abuse of Black women.”<sup>79</sup> This attitude of white men hypersexualizing Black women and treating their bodies as sexual property survived despite their emancipation from slavery.<sup>80</sup>

In the years immediately following the emancipation of slaves, many Black people fled to the north in the Great Migration.<sup>81</sup> Many of the women possibly hoped that moving North would stop white men from raping them and their daughters.<sup>82</sup> This hope, however, was in vain.<sup>83</sup> And up until the 1960s, white men continued to “inva[d]e the homes of Black families in the south, raping mothers and daughters,” all while “perpetuat[ing] the myth that all Black women [were] wild sex animals.”<sup>84</sup> According to bell hooks, white men’s treatment of Black women was dependent on maintaining the assumption that all Black women, regardless of their class, were prostitutes and were available as sex objects.<sup>85</sup> Likening Black women to sex objects has been a way in which white people have historically dehumanized Black women in an attempt to maintain the social construct of Black inferiority through the devaluation of the Black body.

Within this framework, the Black female body is only valuable when it is synonymous with accessibility, availability, and sexual deviance.<sup>86</sup> Due to the fall of chattel slavery, white slaveowners could no longer value Black women’s bodies for the next generation of slaves they could create or for their productive value. As a result, these former slaveowners, and other

<sup>78</sup> See SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 6 (2007).

<sup>79</sup> Danice L. Brown et al., *Breaking the Chains: Examining the Endorsement of Modern Jezebel Images and Racial-Ethnic Esteem Among African American Women*, 15 *CULTURE, HEALTH & SEXUALITY* 525, 526 (2013).

<sup>80</sup> See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 *HARV. L. REV.* 517, 533 (1993).

<sup>81</sup> Vednita Carter, *Prostitution and the New Slavery*, in *NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY* 87 (Rebecca Whisnant & Christine Stark eds., 2004).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 58–59 (1982).

<sup>86</sup> See BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 65–66 (1994).

white actors, needed to find a new value metric to place on Black women's bodies in order to maintain the social caste they enjoyed during the era of chattel slavery.<sup>87</sup> Racist media facilitated this shifting value metric by perpetuating oversexualized stereotypes of Black girls which contributed to the devaluation that both surrounds and erases Black girls and women.<sup>88</sup> Consequently, Black girls today are taught that Black women are sexualized and objectified things, expected to mimic white notions of beauty.<sup>89</sup> For instance, Jennifer Richardson-Stovall describes an interview with a young African immigrant named Kelly who, as a teenager, learned what it meant to be a Black woman in America through the media's hypersexualized images of Black women.<sup>90</sup> "Recent research suggests that Black women report higher levels of experienced objectification than other ethnic groups."<sup>91</sup> The media's interpretation of Black women only as sexualized beings has reduced Black women's value to that of objects.

In order to understand how these misrepresentations of Black women and their bodies impact Black women's place in society, it is important to identify who controls the rhetoric. Isabel Wilkerson identifies both the creation of a caste-based valuation system in society—one in which certain groups of people have a higher societal value than other groups—and the actors who control this rhetoric.<sup>92</sup> Wilkerson defines casteism as any action or structure that seeks to "limit, hold back, or put someone in a defined ranking . . . on the basis of their perceived category."<sup>93</sup> The whole idea of race was a "deliberate creation of an exploiting class seeking to maintain

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<sup>87</sup> See WILKERSON, *supra* note 16, at 24 (quoting GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944)) ("[T]o maintain the color line has, to the ordinary white man, the 'function' of upholding that caste system itself, of keeping the 'Negro in his place'."). "Casteism is the investment in keeping the hierarchy as it is in order to maintain your own ranking, advantage, privilege, or to elevate yourself above others or keep others beneath you." *Id.* at 70; see also *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (positing that little knowledge of human nature is required to anticipate that when those long regarded as inferior would be suddenly raised to the rank of citizenship, the superior class would look onto them with jealousy and positive dislike and enact or enforce laws to perpetuate the distinctions that had previously existed).

<sup>88</sup> See Stephanie Troutman & Ileana Jiménez, *Lessons in Transgression: #BlackGirlsMatter and the Feminist Classroom*, 15 *MERIDIANS* 7, 17 (2016) (citing Jessica S., *A Black Girl's Take on Sexuality and Body Geography*, *F TO THE THIRD POWER* (Oct. 23, 2015), <http://ftothethirdpower.com/2015/10/23/a-black-girls-take-on-sexuality-and-body-geography>).

<sup>89</sup> See Jennifer Richardson-Stovall, *Image Slavery and Mass-Media Pollution: Popularity, Media, Beauty, and the Lives of Black Women*, 56 *BERKELEY J. SOC.* 73, 88 (2012).

<sup>90</sup> *Id.*

<sup>91</sup> Joel R. Anderson et al., *Revisiting the Jezebel Stereotype: The Impact of Target Race on Sexual Objectification*, 42 *PSYCHOL. WOMEN Q.* 461, 463 (2018). Though hypersexuality and the Jezebel stereotype can be imposed on any group of women, this sexualized objectification is primarily used in reference to Black women, further signifying their inferior status. *Id.*

<sup>92</sup> See generally WILKERSON, *supra* note 16 (identifying a race-based caste system in America).

<sup>93</sup> *Id.* at 70.

and defend its privileges against what was profitably regarded as an inferior caste.”<sup>94</sup> The hierarchy was designed for the benefit of the caste that created it.<sup>95</sup> This system is constantly upheld by the superior caste’s interest in maintaining it.<sup>96</sup> The superior caste is white people, specifically white men.<sup>97</sup> Therefore, white men constantly uphold the caste system because they have an interest in upholding it. The closer lower caste members can bring their appearance to that of the dominant caste—white men—the more value attaches to them.<sup>98</sup>

As the self-portrait by African-American artist Emma Amos so eloquently signifies, the Black female body derives its value from the normative value vested in white bodies, male bodies, and especially white male bodies.<sup>99</sup> The self-portrait is an image of Amos’s face on the body of a naked white male—the image of a naked female body lying at his feet, almost as if it was tortured and thrown to the ground.<sup>100</sup> The result of the white male body being the norm is that the Black female body is scripted negatively—as “sexually hyperdeveloped,” excessive, and immoral.<sup>101</sup> When the normative standard is that of the white male, the farther a person deviates from that standard, the lower their personal value.<sup>102</sup> The Black woman is the farthest deviation from that of the white male (in terms of both gender identity and race). This great deviation—coupled with Black women’s past status as white men’s property during the aforementioned chattel slavery era—unfortunately creates a societal dynamic in which Black women derive their value from white men.<sup>103</sup> Black women’s dehumanization and presumed hypersexuality consign them to “the absolute bottom of the social barrel,” as the “oppressed of the oppressed.”<sup>104</sup> As a result, society—primarily comprised of white men, white women, and Black men—has created various derogatory stereotypes of the Black woman to perpetuate the idea that their sole value is in the accessibility and availability of their bodies, while simultaneously exempting itself from culpability.<sup>105</sup> There are many tropes of Black

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<sup>94</sup> *Id.* at 66 (quoting Ashley Montagu, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (1945)).

<sup>95</sup> *See id.* at 182.

<sup>96</sup> *Id.* at 255 (quoting MYRDAL, *supra* note 87).

<sup>97</sup> *See id.* at 28–29.

<sup>98</sup> *Id.* at 238–39.

<sup>99</sup> Desiree Lewis, *Against the Grain: Black Women and Sexuality*, 63 *AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY* 11, 12 (2005) (referencing Amos’s 1994 self-portrait titled “Work Suit”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*; *see also* WILKERSON, *supra* note 16, at 238–39.

<sup>103</sup> *See* Lewis, *supra* note 99, at 13.

<sup>104</sup> Eboni Marshall Turman, “*The Greatest Tool of the Devil*”: *Mamie, Malcolm X, and the PolitiX of the Black Madonna in Black Churches and the Nation of Islam in the United States*, 3 *J. OF AFRICANA RELIGIONS* 130, 138 (2015).

<sup>105</sup> *See id.* (noting how the sexual-gender mythology of Black women as having an innate deviance and animalistic disposition typifies her as a “bad bitch” and thus the principal source of her social destruction).

women as sexual beings that exist in the media and popular culture today. One of the most common stereotypical representations of Black women is the biblically-derived Jezebel.<sup>106</sup>

Enter the creation of the Jezebel. The Biblical Jezebel was the wife of the Israelites King Ahab.<sup>107</sup> Hated for her polygamous faith, she became the representative of all things malicious, revengeful, and cruel.<sup>108</sup> She was restrained by “no fear of either God or man” and became infamous for the most “debased and sensual” forms of idolatry.<sup>109</sup> Her name later became synonymous with a wicked woman.<sup>110</sup> During the chattel slavery era, elite white men transformed the image of the Jezebel into a stereotype of Black women.<sup>111</sup> In the same way that slaveowners used Biblical references to the “mark of Cain” and the “curse of Ham” to justify the enslavement of Black people, they adopted the Biblical Jezebel to justify the economic and sexual exploitation of Black female slaves.<sup>112</sup> The slave-era Jezebel was (and still is) a sexually aggressive Black woman, presented as having a voluptuous body to signify the “wanton, libidinous black woman whose easy ways excused white men’s abuse of their slaves as sexual ‘partners’ and bearers of mulatto offspring.”<sup>113</sup> White Americans cast Black women as “sexually insatiable, unrapeable, licentious, and dirty.”<sup>114</sup> The Jezebel was the counter-image of the mid-nineteenth century ideal of the Victorian lady and white femininity, which was chaste and sexually pure.<sup>115</sup> The slave-era Jezebel stereotype

<sup>106</sup> Sometimes spelled “Jezabel.”

<sup>107</sup> *1 Kings* 16:31 (New International Version).

<sup>108</sup> See Michael Satchell, *Jezebel was a Killer and Prostitute, but She had Her Good Side*, U.S. NEWS (Jan. 25, 2008), <https://www.usnews.com/news/religion/articles/2008/01/25/jezebel-was-a-killer-and-prostitute-but-she-had-her-good-side> [<https://perma.cc/KK5D-AMD2>].

<sup>109</sup> “Jezebel, Easton’s Bible Dictionary,” *Bible Study Tools*, <https://perma.cc/F6JP-N6VV>.

<sup>110</sup> See *Revelation* 2:20 (New International Version).

<sup>111</sup> See Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1345 (1996).

<sup>112</sup> See Nayesha Junior, *The Mark of Cain and White Violence*, 139 J. BIBLICAL LITERATURE 661, 662–63 (2020); see also Tarpley, *supra* note 111, at 1345.

<sup>113</sup> Kamille Gentles-Peart, *Controlling Beauty Ideals: Caribbean Women, Thick Bodies, and White Supremacist Discourse*, 46 WOMEN’S STUD. Q. 199, 203 (2018) (quoting Regina Austin, *Sapphire Bound!*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 432 (Kimberlé Crenshaw et al., eds., 1995)).

<sup>114</sup> Cooper, *infra* note 242, at 133. Cooper also notes that these racial stereotypes are gendered – Black women “grow up being denied the protections of femininity that are always afforded to white women” and this problem is “rooted in both racism and sexism.” *Id.* at 172.

<sup>115</sup> DEBORAH GRAY WHITE, AR’N’T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH 29 (Rev. Ed. 1999); see also Tynslei Spence-Mitchell, *Restroom Restrictions: How Race and Sexuality Have Affected Bathroom Legislation*, GENDER, WORK & ORG. 14, 15 (2020) (citing JESSIE DANIELS, WHITE LIES: RACE, CLASS, GENDER & SEXUALITY IN WHITE SUPREMACIST DISCOURSE (2d. ed. 2016)).

“gave America an ideology for the systemic depiction and use of Black women as designated sexual deviants or targets of sexual abuse.”<sup>116</sup>

Despite many Black women protesting against this trope over time, the Jezebel image has persisted as a representation of Black women in mainstream media. This sexualized image has evolved with the various political, economic, and social changes that have occurred in the United States.<sup>117</sup> Today, the term Jezebel refers to a “worldly seductress”<sup>118</sup> who is reduced to her body and is treated “as little more than a tool that exists for the pleasure of others.”<sup>119</sup> Scholars have noted how even though the media has created many additional tropes for Black women—such as the Gold Digger, the Freak, the Gangster Bitch, and the Baby Mama—the traditional Jezebel stereotype is still embedded in and influences the conception of these modernizations.<sup>120</sup> As society evolves, its main actors—primarily the superior caste of wealthy white men and the legal systems, legislatures, and media they control—find new ways to hypersexualize Black women and define their human value only in terms of their sexuality.

These sexual scripts influence not only how society views Black women, but also how Black women view themselves.<sup>121</sup> This devastating fact is most salient when considering the sexual development of Black girls. For instance, a 2007 study of Black preadolescents’ beliefs about female sexuality evidences how these sexualized stereotypes can affect how Black girls view themselves.<sup>122</sup> The researchers, Dionne P. Stephens and April L. Few-Demo, interviewed seven male- and eight female-identifying Black adolescents aged 11-13.<sup>123</sup> Interestingly, the girls interviewed did not endorse a permissive or casual attitude toward sexual behaviors.<sup>124</sup> However, their understanding of female sexual desire was invariably “linked to male expectations, beliefs, and goals.”<sup>125</sup> Even as preadolescents, these young girls understood that society, particularly men and the media, viewed them as

<sup>116</sup> Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1471 (2015).

<sup>117</sup> See Brown et al., *supra* note 79, at 76.

<sup>118</sup> Anderson et al., *supra* note 91, at 463 (quoting K. JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND 46 (1993)).

<sup>119</sup> *Id.*

<sup>120</sup> Bryana H. French, *More than Jezebels and Freaks: Exploring How Black Girls Navigate Sexual Coercion and Sexual Scripts*, 17 J. AFR. AM. STUD. 35, 37 (2013) (citing Dionne P. Stephens & Layli D. Philips, *Freaks, Gold Diggers, Divas, and Dykes: The Sociohistorical Development of Adolescent African American Women’s Sexual Scripts*, 7 SEXUALITY AND CULTURE 3 (2003)) (noting that modern sexual scripts for Black women and girls are: Diva, Gold Digger, Freak, Dyke, Gangster Bitch, Sister Savior, Earth Mother, and Baby Mama).

<sup>121</sup> See Dionne P. Stephens & April L. Few, *Hip Hop Honey or Video Ho: African American Preadolescents’ Understanding of Female Sexual Scripts in Hip Hop Culture*, 11 SEXUALITY AND CULTURE 48, 49 (2007).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 54.

<sup>124</sup> *Id.* at 62.

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

hypersexualized beings and would affix a value accordingly. The hypersexualized tropes ascribed to Black women influence Black girls' understanding of their place in society, thus reinforcing the Black woman's inferior place in the social caste.<sup>126</sup>

Consequently, in many instances the sexual identity of Black girls will be determined more by how men view them than by how they view themselves. This extrinsic perception impacts their intrinsic value. As Brittney Cooper asks, "how are Black girls supposed to grow up to be Black women in love with themselves in a country built on the structural negation of Black women's humanity and personhood?"<sup>127</sup> So often the blame of the hypersexual image is placed on Black girls. If they had higher self-esteem, then the world would not view them as Jezebels. On the contrary, the Stephens and Few-Demo study indicates that Black girls actually value chastity because they believe men will only want the "good girl" who is still intact, but they also know, even from a young age, that society views them as nothing more than sexualized beings.<sup>128</sup>

This hypersexualized stereotype of Black women has also impacted the racialized sexual victimization of Black women. One common example is the historical trend of white police officers raping Black women.<sup>129</sup> According to Angela Davis, white men have a history of systematically abusing and violating Black women, especially the white men in "uniforms and robes."<sup>130</sup> Unfortunately, in the nearly 40 years since her publication, little has changed. Black women remain just as vulnerable today. A perfect example is the recent indictment of Oklahoma City police officer Daniel Holtzclaw for the rape and sexual assault of at least thirteen Black women and girls.<sup>131</sup> Black women are disproportionately vulnerable to acts of police sex-

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<sup>126</sup> See *id.* at 61; see also Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, GEORGETOWN LAW SCHOOL CENTER ON POVERTY AND INEQUALITY 5, <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/CE79-B7ND>] (citing Sika Dagbovie-Mullins, *Pigtails, Ponytails, & Getting Tail: The Infantilization & Hypersexualization of African American Females in Popular Culture*, 46 J. POPULAR CULTURE 745 (2013)) (defining the hypersexualization of Black girls as society attributing sex as part of the "natural" role of Black women and girls).

<sup>127</sup> Cooper, *infra* note 242, at 91.

<sup>128</sup> See Richardson-Stovall, *supra* note 89, at 88.

<sup>129</sup> See ANGELA DAVIS, *WOMEN, RACE AND CLASS* 173 (1st Vintage Books ed. 1983).

<sup>130</sup> *Id.*

<sup>131</sup> Ken Miller, *Oklahoma Court Upholds Sentence for Ex-Cop Convicted of Rape*, ASSOCIATED PRESS (Aug. 1, 2019), <https://apnews.com/38abab5e04ce42c5a6d5897d38bf4e04> [<https://perma.cc/8E9N-PAH3>]. Holtzclaw was convicted of offenses involving 8 of the 13 women included in the original indictment. *Id.* He was sentenced to 263 years in prison on December 10, 2015, for 18 of the 36 counts charged, including first-degree rape. Sean Murphy, *Ex-Oklahoma Officer Holtzclaw Sentenced for Rapes, Sex Assaults*, ENID NEWS & EAGLE (Jan. 21, 2016), [https://www.enidnews.com/news/ex-oklahoma-officer-holtzclaw-sentenced-for-rapes-sex-assaults/article\\_2fc93c96-c07d-11e5-9b33-0fe3589883a2.html](https://www.enidnews.com/news/ex-oklahoma-officer-holtzclaw-sentenced-for-rapes-sex-assaults/article_2fc93c96-c07d-11e5-9b33-0fe3589883a2.html) [<https://perma.cc/5R4V-RGN4>].

ual violence.<sup>132</sup> The Cato Institute's 2010 study identifies sexual misconduct as the second highest reported form of police misconduct, after use of excessive force.<sup>133</sup> Because police frequently perceive Black women as "potentially violent, predatory, or noncompliant regardless of their actual conduct or circumstances," Black women are hyper-vulnerable to police sexual abuse.<sup>134</sup>

Interestingly enough, though this hypersexual stereotype of the Black women as Jezebel is a direct result of white men attempting to justify their sexual objectification of Black women during slavery, white men—acting for the State—are also more apt to punish Black women when they exhibit Jezebel-like tendencies.<sup>135</sup> The most prevalent example of Black women being disproportionately punished for exhibiting the Jezebel myth is the judicial treatment of Black girls regarding prostitution. Dating back to the first decades after slavery, early juvenile courts "reinforced rather than challenged racial stereotypes that Black . . . girls were more prone to prostitution and sexual immorality."<sup>136</sup> Because of this racialized jurisprudence, the justice system's actors, mainly white men, punished Black girls more severely than white girls for sexual deviance.<sup>137</sup>

Scholars have formed two camps around the idea of modern prostitution. The abolitionist view advocates for the criminalization of those who buy or sell women or girls in prostitution, arguing that prostitution is a modern form of sexual slavery and a "tool of the patriarchal global economy."<sup>138</sup> On the other side, the sexual liberalism view "promotes prostitution or sex work as a legitimate profession that serves as an expression of women's choice and agency."<sup>139</sup> While there is a strong argument to be made in support of the sexual liberalism view and a woman's right to make choices concerning her body, prostitution and sex work can potentially perpetuate the culture of racialized sexual objectification. The debate over law and policy

<sup>132</sup> Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionally Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 168 (2016).

<sup>133</sup> THE CATO INST. NAT'L POLICE MISCONDUCT REPORTING PROJECT, 2010 ANNUAL REPORT 1–2, [http://policeprostitutionandpolitics.org/pdfs\\_all/COPS\\_DAs\\_JUDGES\\_PED\\_PORN/2010\\_CATO\\_National\\_police\\_misconduct\\_report.pdf](http://policeprostitutionandpolitics.org/pdfs_all/COPS_DAs_JUDGES_PED_PORN/2010_CATO_National_police_misconduct_report.pdf) [https://perma.cc/2694-XXA7] (noting that of the 618 officers involved in sexual misconduct throughout 2010, 354 were involved in complaints that involved forcible non-censual sexual activity such as sexual assault or sexual battery).

<sup>134</sup> See Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOWARD L. J. 651, 679 (2016) (quoting ANDREA J. RITCHIE, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 142 (2006)).

<sup>135</sup> See Butler, *supra* note 116, at 1496–97.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Jessica Swanson, *Sexual Liberation or Violence Against Women? The Debate on the Legalization of Prostitution and the Relationship to Human Trafficking*, 19 NEW CRIM. L. REV.: AN INT'L & INTERDISC. J. 592, 593 (2016).

<sup>139</sup> *Id.*

concerning prostitution and sex trafficking often fails to acknowledge how the pervasive stereotyping of Black women as prostitutes and sexual deviants relegates them to a less than human status.<sup>140</sup>

Statistics suggest that the majority of people of color in prostitution “do not freely choose to be there.”<sup>141</sup> Further, data indicates that Black women are often disproportionately represented in prostitution and sex trafficking<sup>142</sup> and are also disproportionately criminally punished. Instead of protecting those who most need help, the criminal justice system disproportionately punishes them. As Catharine MacKinnon has noted, “prostitutes of color in racist cultures” are potentially disproportionately more likely to be arrested than their white counterparts.<sup>143</sup> Prostitution arrests for women of color in the United States are significantly skewed in comparison to their proportion of the general population. According to the Federal Bureau of Investigations (“FBI”) statistics, prostituted African-Americans comprised 37.6% of those arrested in 2017, with 10,605 arrests; in contrast, 56% of those arrested in 2017 were white, accounting for 15,812 arrests.<sup>144</sup> By way of comparison, according to the U.S. Census data for 2019, 76.3% of the population was white and 13.4% identified as African-American.<sup>145</sup> Even “child prostitutes”—an oxymoron considering that children cannot legally consent to sex, and thus cannot consent to prostitution<sup>146</sup>—are more likely to be regarded as criminals than as the victims they truly are.<sup>147</sup> According to the FBI statistics from 2017, 52.5% of minors under the age of eighteen arrested for prostitution were African-American, which is more than any other racial group for under-eighteen prostitution arrests.<sup>148</sup> These disproportionate results substantiate the idea that society ascribes to Black women the identity

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<sup>140</sup> See Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution and Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 99–100 (2015).

<sup>141</sup> *Id.* at 127.

<sup>142</sup> See Tamara E. Hurst, *Internalized Racism and Commercial Sexual Exploitation of Children (CSEC)*, 22 RACE, GENDER, & CLASS 90, 92–93 (2015) (citing to three studies which have noted potential connections between race and childhood commercial sexual exploitation, while also mentioning the dearth of information to make a definitive conclusion).

<sup>143</sup> Catharine MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R. - C.L. 271, 283 (2011).

<sup>144</sup> See FBI, Uniform Crime Statistics, tbl. 43 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-43> [<https://perma.cc/2Q8V-S2ZB>].

<sup>145</sup> See “Quick Facts,” UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/8SVK-R9TP>].

<sup>146</sup> See, e.g., Tama R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U.L. REV 1055, 1095–1100 (2011); Edrina Nazaradeh, *There is No Such Thing as a Child Prostitute: Why Decriminalization is Only the First Step in California*, 45 PEPP. L. REV. 189, 204–05 (2018) (arguing that if, by law, children cannot consent to sex then they cannot consent to prostitution and should thus be treated as victims, not criminals).

<sup>147</sup> MacKinnon, *supra* note 143, at 283.

<sup>148</sup> See FBI, Uniform Crime Statistics, tbl.43B (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-43> [<https://perma.cc/MWM3-9XMT>]. The percentage distribution for white persons under the age of eighteen arrested for prostitution was 45.2%. *Id.*

of the Jezebel while simultaneously punishing them for being sexualized. Furthermore, this punishment is not just condemning Black women for being prostitutes; it also serves to cement their subservient place in society by reinforcing their place in an inferior class.<sup>149</sup>

For so many women, prostitution is a product of lack of choice, or what women resort to when all else fails. For example, according to reports from the early 2000s, the vast majority of women who entered prostitution were victims of child sexual abuse and were forced into prostitution through sex trafficking between the ages of 14 and 17.<sup>150</sup> For women of color, the age at which they enter prostitution is on average 2.5 years earlier than their white counterparts.<sup>151</sup> Chrystul Kizer and Cyntoia Brown, unfortunately, both fall within this age range.<sup>152</sup> Both Ms. Kizer and Ms. Brown were around 16 years old when they were forced into child prostitution.<sup>153</sup> But they were only two examples of many child victims. Before the death of Ms. Kizer's trafficker, Kenosha police uncovered evidence that he was also trafficking many other Black girls, some thought to be as young as 12 years old.<sup>154</sup>

While there are many women, and many women of color specifically, who willingly choose to engage in sex work, many others feel that there is no other opportunity available for them. American society perpetuates the vulnerabilities that lead Black girls to feel that they must engage in sex work and prostitution.<sup>155</sup> The hypersexualization of Black women through the Jezebel stereotype undercuts any willingness society—primarily the superior caste and the legal systems, legislatures, and media they control—may have to help Black women escape poverty through other means.<sup>156</sup> Black women appear to be deserving of their socioeconomic status because social actors, including those within legal systems, legislatures, and the media, have deemed them to be sexually deviant and only valuable as sex objects.<sup>157</sup> Therefore, poverty is often a driving factor for women entering sex work because they know there is a demand for women of color in prostitution.<sup>158</sup> Unfortunately, these women engaging in sex work as a means to overcome poverty further reinforce the criminal justice system's belief that these women are sexually deviant actors who are deserving of punishment.<sup>159</sup> By way of example, Chrystul Kizer met her trafficker through Backpage.com be-

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<sup>149</sup> See Butler, *supra* note 140, at 124–26.

<sup>150</sup> ROSENFELD, *supra* note 67, at 443.

<sup>151</sup> See Hurst, *supra* note 142, at 93.

<sup>152</sup> See Contrera, *supra* note 1; Hauser, *supra* note 10.

<sup>153</sup> See Contrera, *supra* note 1; Hauser, *supra* note 10.

<sup>154</sup> Contrera, *supra* note 1.

<sup>155</sup> See Butler, *supra* note 140, at 132–33.

<sup>156</sup> See *id.* at 134.

<sup>157</sup> See *id.* at 134–35.

<sup>158</sup> See *id.* at 130.

<sup>159</sup> See Ocen, *supra* note 12, at 1639–40.

cause she needed money for school supplies and had no other financial support.<sup>160</sup>

In addition to poverty, unequal educational and employment opportunities also increase the risk that Black women will feel a need to engage in sex work.<sup>161</sup> Black people in America have been systematically denied equal access to education in the United States.<sup>162</sup> Cheryl Nelson Butler argues that this unequal access to education increases the risk that minors will become involved in prostitution because Black people are more likely to be expelled from school and punished for minor behavior infractions, thus limiting their employment opportunities.<sup>163</sup> Nelson Butler also notes how Black women are highly susceptible to employment discrimination.<sup>164</sup> Deprivation of employment opportunities compels some women into prostitution as a means of survival.<sup>165</sup> Even though these women have chosen to enter into prostitution, in the absence of another legitimate means of survival this “choice” is more likely than not driven by coercion.<sup>166</sup>

The Jezebel stereotype and the resulting hypersexualization of Black women mold the subconscious biases of decision-makers in the criminal justice system.<sup>167</sup> As a result, the criminal justice system does not protect Black women and girls because the system perceives them as animalistic and sexually predatory beings. Thus, the criminal justice system does not consider them valuable enough for protection. Violence against Black women is essential to preserving the racial capitalist state.<sup>168</sup> As a result, ideologies of Black female depravity and deviance such as the Jezebel protect that status quo and “undergird[ ] Black women’s higher rates of incarceration to this day.”<sup>169</sup> Protecting Black girls would require the state actors—primarily legislatures, agents of the executive branch, and the judiciary—to admit that the Jezebel trope was completely constructed to legitimize the sexual violence of white men and to maintain the subordination of Black women, but they do not appear ready to admit the role the criminal justice system has played in the prostitution and exploitation of Black girls. Instead, these negative stereotypes are so pervasive that investigators describe a 15-year-old Black girl as “prostituting herself out”<sup>170</sup> when she runs away from her trafficker’s house and reaches out to the police for assistance.

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<sup>160</sup> Contrera, *supra* note 1.

<sup>161</sup> Butler, *supra* note 140, at 133.

<sup>162</sup> *Id.* at 135–36.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 137.

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at 138.

<sup>167</sup> *See* Molly A. Schiffer, *Women of Color and Crime: A Critical Race Theory Perspective to Address Disparate Prosecution*, 56 ARIZ. L. REV. 1203, 1215 (2014).

<sup>168</sup> Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 33 (2019).

<sup>169</sup> *See id.*

<sup>170</sup> *See* Contrera, *supra* note 1 (quoting from the investigator’s report regarding the 15-year-old girl who ran away from Volar’s home).

PART III: THE FAILURE OF LAWS TO PROTECT THE BLACK WOMEN WHO  
NEED THEM MOST

Slaveholders' objectification of Black women during chattel slavery, and the resulting hypersexualized stereotypes created a criminal justice system in which its actors—namely police officers, prosecutors, legislators, and judges—are unable, or unwilling, to provide protections to Black women and girls when needed.<sup>171</sup> Despite the end of slavery over 150 years ago, the civil rights movement, declarations of equal justice for all American citizens, and a slew of recent legislation aimed at protecting all women, the criminal justice system still does not protect Black lives as much as it protects white lives.<sup>172</sup> Often, the state transparently signals that certain lives are more valuable than others and hence worthy of greater protection.<sup>173</sup> Howard Steven Friedman discusses this value in terms of the severity of penalties for murdering certain persons over others, e.g., murdering a police officer typically elicits a particularly severe punishment.<sup>174</sup> Friedman concludes that the greater penalties for murdering these people indicate that their deaths are deemed a greater loss to society than the deaths of some others.<sup>175</sup> Based on this conclusion and based on the disparate sentencing of Black women in particular, it logically follows that the state actors—police officers, prosecutors, judges, etc.—have placed an implicit devaluation on the lives of Black women, making them less protected. This lack of protection for and increased criminalization of Black women has led many to self-protect.

Chrystul Kizer and Cyntoia Brown are perfect examples of how Black girls feel compelled to respond when they are backed into a corner without anyone to protect them. White men sexually abused both Ms. Kizer and Ms. Brown for years, until both girls reached a point where they feared for their lives. While their stories are heartbreaking, they are not anomalies. Ms. Kizer and Ms. Brown are unfortunately part of a long list of Black women who had no solution but to defend themselves and then faced harsh forms of punishment for their actions.

The reality of harsh sentencing is not limited to victims of sex trafficking. Women who kill their intimate partner or spouse are often subjected to more severe treatment and harsher sentences than men who kill their intimate partner or spouse.<sup>176</sup> This disparate treatment is even more apparent for

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<sup>171</sup> See Butler, *supra* note 116, at 1496–97.

<sup>172</sup> HOWARD STEVEN FRIEDMAN, *ULTIMATE PRICE: THE VALUE WE PLACE ON LIFE* 47 (2020).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See Ryan Elias Newby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 *HASTINGS WOMEN'S L.J.* 113, 119 (2011). However, there is also some data that indicates women are less likely to be arrested and charged with other crimes. See *id.* at 116.

women who are victims of intimate partner violence.<sup>177</sup> Estimates of this harsher treatment range from fifteen to twenty years for a female defendant compared to only two to six years for a male defendant.<sup>178</sup> For instance, consider the case of Marissa Alexander. In 2012, Marissa was convicted of aggravated assault charges after firing a non-lethal “warning shot” at her abusive husband when he entered the house in violation of the restraining order against him.<sup>179</sup> She was sentenced to twenty years and spent six years either in prison or on house arrest as a result.<sup>180</sup> Statutes such as the Stand Your Ground statute<sup>181</sup> have failed to protect some of our most vulnerable members of society. Further, studies indicate racial and gender biases in the outcome of Florida cases when the Stand Your Ground law is invoked. Most strikingly, the probability of conviction in an objectively similar Stand Your Ground case involving domestic relations doubles when the defendant is a woman, as compared to when the defendant is a man.<sup>182</sup>

When women kill, they most frequently kill their partners, and they usually do so in self-defense.<sup>183</sup> There is some evidence to indicate that as many as 90% of the women in prison for murder or manslaughter of a partner suffered physical assaults by the decedents.<sup>184</sup> Men make and interpret

<sup>177</sup> See Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 255 (1996).

<sup>178</sup> *Id.*

<sup>179</sup> Lindsey Peoples, *Marissa Alexander Fired a Warning Shot at Her Abusive Husband and was Sentenced to 20 Years. Now She's Free*, THE CUT (Mar. 29, 2017), <https://www.thecut.com/2017/03/marissa-alexander-case-stand-your-ground-florida.html> [<https://perma.cc/DG5M-LCVPI>].

<sup>180</sup> Christine Hauser, *Florida Woman Whose 'Stand Your Ground' Defense Was Rejected is Released*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html> [<https://perma.cc/UPQ7-MVLH>]; Keller, *supra* note 166, at 256. Compare Marissa Alexander's sentence for only firing a warning shot with the sentencing of a man convicted of the murder of his wife, reduced from ten years to five years and then determined that four of those years would be suspended. See Anthony Thornton & Charolette Aiken, *Redbook Labels 2 State Judges "Sexist" Wife, Judge Deny Bias in Rulings*, OKLAHOMAN (Jan. 11, 1994), <https://oklahoman.com/article/2453609/redbook-labels-2-state-judges-sexist-wife-judge-deny-bias-in-rulings> [<https://perma.cc/TV5T-UTXF>]. Judge Gail Craytor allowed this defendant to be released after four months, supposedly because he had only beaten his wife to death as opposed to using a gun. *Id.* In another case, Judge Craytor suspended another defendant's twenty-five-year sentence for killing his wife with a “high-powered rifle” after he served less than six months. *Id.*

<sup>181</sup> See FL. ST. § 776.013.

<sup>182</sup> See Justin Murphy, *Are 'Stand Your Ground' Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005 – 2013*, 99 SOC. SCI. Q. 439, 451 (2018).

<sup>183</sup> Keller, *supra* note 177, at 260.

<sup>184</sup> “Fact Sheet on Battered Women in Prison,” PURPLE BERETS, [http://www.purpleberets.org/pdf/bat\\_women\\_prison.pdf](http://www.purpleberets.org/pdf/bat_women_prison.pdf) [<https://perma.cc/9J65-JJTR>] (citing Allison Bass, *Women far less likely to kill than men; no one sure why*, BOSTON GLOBE, (Feb. 24, 1992) p. 27); see also Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J.F. 772, 786 (2019) (quoting *Survivors of Abuse and Incarceration*, CORRECTIONAL ASS'N N.Y., <https://www.correctionalassociation.org/issue/domestic-violence> [<https://perma.cc/J2PJ-YGEA>]) (noting that three-quarters of women in prison “have histories of severe physical abuse by an intimate partner during adulthood, and 82% suffered serious physical or sexual abuse as children”).

laws, such as the legal doctrine of self-defense, from the prism of men's lives.<sup>185</sup> For instance, even though current language in jury instructions asks the jury to assess the circumstances from the viewpoint of "the reasonable person," this prism is often male-centric because many legal ideals are masculine values.<sup>186</sup> This law-as-male perspective coupled with the higher average valuation of white men's lives over women and minorities<sup>187</sup> means that legal doctrines do not encompass the viewpoints of other types of defendants.<sup>188</sup> For instance, judges often believe that "women goaded the husband into the act of killing her," resulting in gendered views as to what constitutes provocation and how often sentences should be mitigated for killings of women by men relative to killings of men by women.<sup>189</sup>

Consequently, other types of non-male identifying defendants—particularly women of color and women who are victims of violence—are often forced to portray themselves as ill or insane to fit within the boundaries of the law because the law does not recognize the stifling social conditions that contributed to their criminal acts.<sup>190</sup> Women defendants must justify their actions through some sort of biological or mental illness such as "battered women's syndrome,"<sup>191</sup> rather than address the constraints placed on women with abusive partners. As Dorothy Roberts aptly observed, "society is more willing to cure women's diseases than to change women's social circumstances."<sup>192</sup>

These gendered biases are even more pronounced if the woman does not fit within society's notion of "female."<sup>193</sup> The women who are typically prosecuted more harshly are women perceived by the state as being "unladylike."<sup>194</sup> This perception usually stems from a woman not conforming to the idea of a middle-class, heterosexual white woman.<sup>195</sup> Therefore, if a wo-

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<sup>185</sup> See Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White and Racialized*, 51 WASH. & LEE L. REV. 431, 440 (1994).

<sup>186</sup> See *id.*

<sup>187</sup> See Friedman, *supra* note 172, at 172–73.

<sup>188</sup> See Daly, *supra* note 185, at 439–41, 447.

<sup>189</sup> Keller, *supra* note 177, at 268 (quoting Shelley A. Bannister, *Battered Women Who Kill Their Abusers: Their Courtroom Battles*, in IT'S A CRIME: WOMEN AND JUSTICE 316, 327 (Roslyn Muraskin & Ted Alleman eds., 1993)).

<sup>190</sup> Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 11 (1994).

<sup>191</sup> While this term is now disfavored and has been replaced by other terms such as "intimate partner violence," for historical purposes the use of the term is still important to understand how women have traditionally been required to define their self-defense in terms of a mental instability. See generally Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER & L. 485 (1998) for discussion of "battered women's syndrome" and the negative effects that the concept can have on women.

<sup>192</sup> *Id.* at 11.

<sup>193</sup> See Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 482 (2005).

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

man is low-income, homosexual, or a minority, then she will likely be perceived as more unfeminine and more aggressive, and as a result, more deserving of punishment.<sup>196</sup> For example, feminist activist and legal scholar Lynn Hecht Schafran has argued that Black women who present a “battered women defense” after killing their abusers face an extra burden because stereotypes depict these women as aggressive and hostile, which directly contradicts the image of an abused woman as “white, blonde, small, and meek.”<sup>197</sup> However, the characteristic most defining of femininity is the idea of chastity.<sup>198</sup> Throughout history, society has defined a woman's value and honor in terms of her chastity.<sup>199</sup> The two were intertwined and seemingly became one.<sup>200</sup> This idea has permeated the criminal justice system. For instance, before the creation of rape shield laws in the 1970s, belief in a woman's claims of rape was entirely dependent on her sexual purity.<sup>201</sup> Some scholars have even argued that the criminalization of prostitution was a result of Progressive Era policymakers' attempt to maintain existing norms of feminine chastity.<sup>202</sup> Criminalizing prostitution allows the stigma to remain so that “a disreputable woman could not pass herself off as law-abiding, chaste, or otherwise fit for respectable employment or marriage.”<sup>203</sup> Through the disproportionate criminalization of Black women for crimes counter to the feminine image, the criminal justice system separates these women from femininity, thus, reinforcing the Black woman's place in the inferior caste.

The disproportionate prosecution of sexually exploited Black girls and the disproportionate prosecution of victims of intimate partner violence are both effects of the superior caste persistently maintaining the devaluation of women's bodies, particularly Black women's bodies. Not only are Black women and girls not valued enough to be protected, but they will be severely punished for killing someone whom the criminal justice system deems to be “more valuable,” even if these women commit the crime to save themselves.<sup>204</sup> In a criminal justice system that determines punishment based on the level of blameworthiness or culpability of the defendant, it is unsurprising that judges and prosecutors conduct an intrinsic value analysis when meting out sanctions. What is surprising is that a woman's value in society is so low that a known sex trafficker of children such as Randy Volar<sup>205</sup> or a

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<sup>196</sup> See *id.*

<sup>197</sup> Lynn Hecht Schafran, *Women of Color in the Courts*, TRIAL MAGAZINE (Aug. 1999) at 22.

<sup>198</sup> See Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1862 (2008).

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 1859–60.

<sup>202</sup> Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 58 (1995).

<sup>203</sup> *Id.* at 58–59.

<sup>204</sup> See Friedman, *supra* note 172, at 47 (concluding that people receive greater penalties for murdering persons depending on the victim's relative value to society).

<sup>205</sup> Chrystal Kizer's trafficker. Contrera, *supra* note 1.

child rapist such as Johnny Allen<sup>206</sup> is considered more valuable than a victimized Black or brown girl such as Chrystal Kizer or Cyntoia Brown. It appears that, even in these instances, killing a man incurs a higher debt to society than killing a woman.

The criminal justice system is inherently racist and sexist in its very statutes as well as the enforcement of those statutes.<sup>207</sup> For generations, various scholars and intellectuals have argued that even facially race-neutral legislation inherently impacts different groups in disproportionate ways.<sup>208</sup> Victoria Earle Matthews has addressed how legal actors embedded the social construction of race and gender into the law for the purpose of maintaining white male privilege.<sup>209</sup> Carol Smart has identified the criminal law and justice system as sexist, male, and gendered.<sup>210</sup> Sexism may not be manifested overtly in the criminal justice system, but it is subtly reinforced through the perpetuation of gender roles, the expectation that women are not violent beings, and the categorization of any female violence as biological or mental illness.<sup>211</sup> Similarly, while racism may not be overtly expressed in the criminal justice system, it is reinforced through the “racial construction of crime”: coloring the criminal justice system as “white” and the criminal as “black.”<sup>212</sup> The criminal justice system’s longstanding complicity and even active support in the perpetuation of sexism and racism undoubtedly affects the system’s ability to create neutral statutes.

Even laws legislators wrote to intentionally protect women predominantly protect only white women in practice. For instance, consider the Trafficking Victims Protection Act (“TVPA”). The TVPA was originally enacted in 2000 and has been widely supported on both sides of the aisle.<sup>213</sup> The main goal of the TVPA was to provide protections and support for victims of human trafficking, especially victims who identify as women or who are

<sup>206</sup> Cyntoia Brown’s rapist. Hauser, *supra* note 10.

<sup>207</sup> Cf. Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER L.J. 43, 69 (1992) (arguing that rape law reform models have perpetuated the inherent sexism and the inherent racism in criminal law).

<sup>208</sup> See, e.g., Nishaun T. Battle, *From Slavery to Jane Crow to Say Her Name: An Intersectional Examination of Black Women and Punishment*, 15 MERIDIANS: FEMINISM, RACE, TRANSNATIONALISM 109, 123 (2016); Carol Smart, *The Woman of Legal Discourse*, 1 SOC. & LEGAL STUD. 29, 30 (1992).

<sup>209</sup> Battle, *supra* note 208, at 123 (citing VICTORIA EARLE MATTHEWS, *THE AWAKENING OF THE AFRO-AMERICAN WOMAN* (1897) (speech stating that laws did not protect Black women, but instead served to protect the white man)).

<sup>210</sup> Smart, *supra* note 208, at 30.

<sup>211</sup> See Biko Agozino, *Is Chivalry Colour-Blind? Race-Class-Gender Articulation in the Criminal Justice System*, 2 INT’L J. OF DISCRIMINATION AND L. 199, 204 (1997) (citing MARY EATON, *The Question of Bail on Behalf of Men and Women*, in GENDER, CRIME, AND JUSTICE (Pat Carlin & Anne Worrall eds., 1987)).

<sup>212</sup> See Carolyn Wolpert, *Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories*, 36 AM. CRIM. L. REV. 265, 269, 281 (1999).

<sup>213</sup> See Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (2000) (listing sponsors including both Republicans and Democrats).

legally minors.<sup>214</sup> Advocates appear to “unequivocally agree . . . that minors are victims by virtue of their inability to legally consent to sex.”<sup>215</sup> However, Jasmine Phillips notes that this assertion presumes that all minors are afforded the same “victim” status.<sup>216</sup> On the contrary, various academic works and anecdotal evidence indicate that Black girls are not afforded the same victim status because of the Jezebel trope and the media's perpetuation of the hypersexualized stereotype, as discussed in Part II.<sup>217</sup>

The TVPA asserts that all persons under the age of eighteen are victims of trafficking or commercial sexual exploitation (CSEC) without having to prove fraud, force, or coercion.<sup>218</sup> The implication is that victim status will be presumed for all minors. However, a quick glance at Chrystul Kizer's case easily dispels any notion that the language of the TVPA as applied in practice affords victim status for *all* minors.<sup>219</sup> In practice, Black girls do not qualify as victims. Most people would likely acknowledge that human trafficking is a serious problem, but when presented with video evidence of a 34-year-old man forcing Black girls as young as 12 to perform sexual acts, the police fail to charge the individual responsible.<sup>220</sup> Instead, the district attorney claimed that he could not easily ascertain the ages of the girls, so he was unaware if the alleged crime was a misdemeanor or felony.<sup>221</sup> Instead, due to the sexualized stereotyping of Black girls, the district attorney and the officers involved in the case possibly saw these victims as willing participants in the sale of sex and, furthermore, likely perceived these children to be older and more sexually mature.<sup>222</sup> Instead, the legal actors in Kenosha

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<sup>214</sup> See Jasmine Phillips, *Black Girls and the (Im)possibilities of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, 1644 (2015).

<sup>215</sup> *Id.* at 1645.

<sup>216</sup> See *id.*

<sup>217</sup> See *supra* Part II; see also Phillips, *supra* note 214, at 1657–59 (discussing how Black women and girls do not fit within the confines of the dominant victim narrative because of the controlling image of Black girls as hypersexualized beings).

<sup>218</sup> See U.S. DEP'T STATE, TRAFFICKING IN PERSONS REPORT 7 (June 2011). <https://2009-2017.state.gov/documents/organization/164452.pdf> [<https://perma.cc/E492-2JNZ>].

<sup>219</sup> Cf. Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1787, 1792–94 (2012) (arguing that even states that have laws enacted to protect victims still allow for the prosecution of some minors, which frustrates the object and purpose of the TVPA; minors who should be considered victims under federal law can nonetheless be considered offenders under state law); see also Hannah Eberts, *#SayHerName: Chrystul Kizer's Story*, TCU WOC (May 6, 2019), <https://wocfeminisms.wixsite.com/wocfeminisms/post/chrystul-kizer> [<https://perma.cc/M3J3-MRYY>] (stating Chrystul Kizer should be given protections under TVPA instead of being charged with criminal homicide).

<sup>220</sup> See *id.* (discussing how after police confiscated more than 20 child pornography “home videos” of Volar with young Black girls, he was not taken into custody).

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

<sup>222</sup> See *id.* (extrapolating assertion from Rachel Monaco-Wilcox's statement that “[c]hildren, especially children of color, are still seen as willing participants in the sale of sex, and research shows black girls are routinely perceived as older and more sexually mature than their white peers.”).

failed to presumptively provide Chrystul Kizer and her trafficker's other victims protections under the victim status of the TVPA even though these victims were minors.

Legal actors rarely acknowledge Black women and girls' victim status, even when presented with legal evidence.<sup>223</sup> For instance, consider the case of Alexis Martin, who served seven years of a life prison sentence for the murder of her human trafficker<sup>224</sup> because her lawyer did not believe she was a human trafficking victim entitled to protection under the Ohio Safe Harbor Law.<sup>225</sup> The Ohio Safe Harbor Law provides for the juvenile court to hold a complaint in abeyance at any time before adjudication if the court has reason to believe the child is a human trafficking victim.<sup>226</sup> The abeyance would allow the victim the opportunity to enroll in a diversion program "such as health and trauma education" that, "if successfully completed, could lead to expungement" from Alexis's record.<sup>227</sup> Despite becoming a victim of sexual abuse at the age of nine and being a human trafficking victim since the age of thirteen, her lawyer did not deem it necessary to present the human trafficking evidence because he determined this young Black girl did not qualify for victim status under the statute.<sup>228</sup> By the time he realized his mistake, it was too late—Alexis had been sentenced to twenty-one years in prison when she was only seventeen years old.<sup>229</sup> Even though Ohio Governor Mike DeWine granted her clemency amid the novel coronavirus outbreak in 2020, Alexis Martin should have never been in prison.<sup>230</sup>

The TVPA and related state statutes, as written, cannot protect Black girls on a systemic level because Black girls often do not fit within the prevailing framework of victims, or even of children in many instances. Jasmine

<sup>223</sup> See, e.g., Phillips, *supra* note 214, at 1645, 1657–59 (discussing legal actors' failure to acknowledge Black women and girls as human trafficking victims).

<sup>224</sup> Though she was convicted of murder, Alexis Martin did not actually kill her trafficker. Her friend was involved in his killing after Martin reached out to the friend for help with escaping the abuse. At the time of the murder, she claims that she was actually being raped by another man. See Jasmine Minor, *Alexis Martin Must Get Through a Decade of Parole Before She Can See Some Loved Ones Again*, WCPO CINCINNATI (Nov. 12, 2020), <https://www.wcpo.com/news/state/state-ohio/alexis-martin-must-get-through-a-decade-of-parole-before-she-can-see-some-loved-ones-again> [<https://perma.cc/HJ82-BFKQ>].

<sup>225</sup> See Brief for Human Trafficking Law Clinic of Case Western Reserve University School of Law as Amici Curiae Supporting Defendant-Appellant at 8, *State v. Martin*, appeal docketed, No. 2016-1891 (Ohio Sept. 19, 2017) (citing Alexis's attorney's affidavit, where he admitted that he did not believe the statute applied to Alexis).

<sup>226</sup> Oh. St. § 2152.021(F)(1)(b).

<sup>227</sup> See Max Londberg, *Sex Trafficking Survivor Alexis Martin Will Be Released from Prison by Ohio's Governor*, CINCINNATI ENQUIRER (Apr. 17, 2020), <https://www.cincinnati.com/story/news/2020/04/17/sex-trafficking-survivor-alexis-martin-being-released-ohio-prison/5154816002/> [<https://perma.cc/4RK3-KZMW>]; see also OHIO HUM. TRAFFICKING TASK FORCE, *Overview of State and Federal Human Trafficking Law*, [https://humantrafficking.ohio.gov/links/Overview\\_of\\_State\\_and\\_Federal\\_HT\\_Laws.pdf](https://humantrafficking.ohio.gov/links/Overview_of_State_and_Federal_HT_Laws.pdf) [<https://perma.cc/D4MA-SNVD>].

<sup>228</sup> See Brief for Human Trafficking Law Clinic, *supra* note 225, at 7–8.

<sup>229</sup> See *id.* at 8.

<sup>230</sup> Londberg, *supra* note 227.

Phillips argues that advocates must recognize how race informs conceptions of victimhood and must change the focus by centering Black girls in conversations about CSEC.<sup>231</sup> There must be a shift in the societal consciousness and perception of Black women. Society as a collective must extinguish the myth of the Jezebel, and societal actors, mainly men, must begin to view Black women as more than vessels for sexual gratification.

Even apart from sexual exploitation, statutes and regulations claiming to be focused on protecting women disproportionately fail to protect Black women. Some states have statutes providing criminal protections to victims of intimate partner violence (“IPV”) who are convicted of crimes directly linked to the abuse, such as situations where the victims fight back against their abusers. For instance, New York’s Domestic Violence Survivors Justice Act (“DVSJA”) attempts to provide protections to women who commit crimes directly related to their status as IPV victims.<sup>232</sup> The DVSJA allows judges to: (1) impose mitigated sentences—including reduced sentences and community-based alternatives to incarceration—and (2) review and amend sentences for survivors convicted and incarcerated prior to the Act’s enactment if the defendant-survivor meets certain criteria.<sup>233</sup> While facially the DVSJA is a step in the right direction for the New York criminal justice system, in practice this statute does not fully extend its protections to Black women. In order to qualify for resentencing under the DVSJA, the defendant-survivor must produce at least two pieces of evidence corroborating their claim of being a victim of substantial IPV at the time of the offense.<sup>234</sup> Additionally, at least one of these documents must be an official piece of evidence, such as a court record, hospital record, domestic incident report, sworn statement from a witness to the IPV, or an order of protection.<sup>235</sup>

Requiring a defendant-survivor to produce formal evidence corroborating their claim of being abused is biased against Black women because Black women are less likely to report instances of domestic violence than white women.<sup>236</sup> Black women hesitate to report abuse by Black men because of the “readiness of the outside society to label or blame these acts of violence as racially predictable.”<sup>237</sup> As Lisa Martinson so aptly states, Black women’s fear of being ostracized within their racial community places them in a dilemma between protecting Black men from society and protecting

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<sup>231</sup> Phillips, *supra* note 214, at 1647.

<sup>232</sup> See generally N.Y. Penal Law § 60.12 (McKinney 2019).

<sup>233</sup> See *id.*; N.Y. Penal Law § 70.45 (McKinney 2019).

<sup>234</sup> Crim. Proc. Law § 440.47(2)(c) (McKinney).

<sup>235</sup> *Id.*

<sup>236</sup> See Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN’S L.J. 259, 269 (2001) (claiming Black domestic violence victims are less likely to turn to police and the courts for protection); see also *id.* at 263 (claiming victims of color face problems that white victims do not experience).

<sup>237</sup> *Id.* at 264 (citing Christine O’Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 959 n.171 (1999)).

themselves from the abusive Black men.<sup>238</sup> Martinson concludes that the lack of reporting of domestic violence within the Black community is a result, in part, of the victim balancing the trauma of “abuse against the fear that the community will not support her decision to report and/or leave the abuser.”<sup>239</sup> These women are so often “criticized by their own communities for putting their men into the criminal justice system because of its maltreatment of men of color.”<sup>240</sup> In *Eloquent Rage: A Black Feminist Discovers Her Superpower*, Brittney Cooper, a Black feminist who watched her father physically abuse her mother, expresses this exact idea.<sup>241</sup> Cooper articulates that she does not understand why Black feminists resent white women more than Black men when the Black men are the ones committing the physical and emotional violence towards Black women.<sup>242</sup> Nevertheless, Black women still show up and support Black men.<sup>243</sup> To be a Black woman is to always have to choose between race and gender.<sup>244</sup>

Even in the rare instances when Black women do reach out to law enforcement to make the type of official record of their abuse required under the DVSJA, Black women are less likely to be believed by law enforcement than white women.<sup>245</sup> In one instance, police officers denied assistance to a Black woman because of her skin color.<sup>246</sup> As Traci West recounts, the police were called to a Black victim’s house numerous times in response to her partner abusing her, and each time her complaints were discounted partly because her bruises were not as apparent on her dark skin.<sup>247</sup> After the police ignored her multiple attempts to ask for help, she killed her abuser.<sup>248</sup> If the police had assisted her when she reached out for help, she would likely not have felt forced to self-protect. This underenforcement is all too common for women, especially Black women.<sup>249</sup> Law enforcement officers choosing who is worthy of their protection exacerbates the social control over Black women and reinforces their subordination.<sup>250</sup> While many in the legal community praised the DVSJA as a positive reform in the direction of protecting

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<sup>238</sup> *See id.*

<sup>239</sup> *Id.* at 264–65.

<sup>240</sup> Hecht Schafran, *supra* note 197, at 22.

<sup>241</sup> BRITTNEY COOPER, *ELOQUENT RAGE: A BLACK FEMINIST DISCOVERS HER SUPERPOWER* 36 (2018).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 156.

<sup>245</sup> *See* Shaun Ossei-Owusu, *Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse*, 18 AM. U. J. GENDER, SOC. POL’Y & L. 607, 617 (2010) (arguing that socially stigmatized women are targets of police misconduct and are often unlikely to be believed).

<sup>246</sup> TRACI WEST, *WOUNDS OF THE SPIRIT: BLACK WOMEN, VIOLENCE, AND RESISTANCE ETHICS* 123 (1999).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *See* Ossei-Owusu, *supra* note 245, at 618–19.

<sup>250</sup> *See id.* at 619.

women,<sup>251</sup> the statute disproportionately fails to protect Black women based on the requirements needed for women even to qualify for resentencing.

Proponents of the DVSJA will point to the landmark decision in Patrice Smith's case as proof positive that the new statute protects Black women. In 1998, Patrice was convicted of the murder of her abuser.<sup>252</sup> She was sixteen years old at the time, fifty-five years younger than the abuser in question.<sup>253</sup> Patrice was the first person to be resentenced for a murder conviction under the DVSJA—her original twenty-five-year sentence was reduced to twelve years.<sup>254</sup> Patrice was released on September 18, 2020 after serving twenty-one years in prison.<sup>255</sup> While Patrice's story demonstrates that the statute can be useful in some ways, it does not entirely negate the likelihood of any of the aforementioned issues created by the evidence requirements.

Furthermore, the DVSJA's allowance of judicial discretion fails to acknowledge the extent to which the criminal justice system discounts the credibility of women survivors.<sup>256</sup> Judges often "improperly discount as implausible women's stories of abuse, due to a failure to understand the symptoms arising from neurological and physiological trauma as well as the practical realities of survivors' lives."<sup>257</sup> The tendency to discredit all women is also deeply embedded in the broader cultural understanding of gendered stereotypes, which "influences the way credibility is assessed in the legal

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<sup>251</sup> See, e.g., *Committee Report: Report in Support of the Domestic Violence Survivors Justice Act*, N.Y.C. BAR (Apr. 8, 2019), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-domestic-violence-survivors-justice-act> [https://perma.cc/E48U-BYPV].

<sup>252</sup> *Patrice Smith Released: Support Her Freedom!*, SURVIVED AND PUNISHED (Oct. 20, 2020), <https://survivedandpunished.org/2020/10/20/patrice-smith-released-support-her-freedom/> [https://perma.cc/M8ZY-QQ4A].

<sup>253</sup> *Id.*

<sup>254</sup> Ashley Rowe, *Judge Has Mercy on Buffalo Woman for Man's Murder, Grants Freedom Under New Law*, WKBW BUFFALO (Sept. 9, 2020), <https://www.wkbw.com/news/local-news/judge-has-mercy-on-buffalo-woman-for-mans-murder-grants-freedom-under-new-law> [https://perma.cc/N72W-DG74].

<sup>255</sup> See Patrice Smith Inmate Lookup, N.Y. STATE DEP'T OF CORR. AND COMMUNITY SUPERVISION, <http://nysdoccslookup.doccs.ny.gov> (follow hyperlink; then enter "Smith" in the last name field and "Patrice" in the first name field; then search for "Patrice Smith" with Department Identification Number (DIN): 99G1544); see also Aaron Besecker, *Convicted as Teen in '98 Homicide, Buffalo Woman to Be Freed Thanks to Domestic Violence Law*, BUFFALO NEWS (Sept. 17, 2020), [https://buffalonews.com/news/local/crime-and-courts/convicted-as-teen-in-98-homicide-buffalo-woman-to-be-freed-thanks-to-domestic-violence/article\\_a0b278ac-f8fc-11ea-80ea-6fa209d72d33.html](https://buffalonews.com/news/local/crime-and-courts/convicted-as-teen-in-98-homicide-buffalo-woman-to-be-freed-thanks-to-domestic-violence/article_a0b278ac-f8fc-11ea-80ea-6fa209d72d33.html) [https://perma.cc/4JS4-7PPK].

<sup>256</sup> See Remy Bogna, *Domestic Violence Survivors Justice Act: Potential Mitigation, Not Guaranteed Fix*, N.Y.U. J. LEGIS & PUB. POL'Y QUORUM (2020), <https://nyujlpp.org/quorum/bogna-domestic-violence-survivors-justice-act/> [https://perma.cc/R7Y7-QFPA] (arguing that the DVSJA offers only theoretical relief due to the lack of meaningful guidance with respect to judicial discretion); see also Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 404–05 (2019) (arguing that domestic violence prosecutions rely almost entirely on judges' perceptions of survivor credibility).

<sup>257</sup> Epstein & Goodman, *supra* note 256, at 405.

system.”<sup>258</sup> Additionally, the previously discussed negative stereotypes ascribed to Black women increase the potential for judges and other criminal justice officers to disbelieve them.<sup>259</sup> Therefore, despite Patrice Smith’s success story, the DVSJA will likely fail to protect Black women equally, if at all, because of the formal evidence requirements and the broad discretion allowing a judge to discount a victim’s story and deny sentencing considerations.

While there have been many movements to reform the racial disparities and biases in the criminal justice system, “the messages and goals of these movements have seldom acknowledged the complexities of violence against Black women.”<sup>260</sup> Most pushes for criminal justice reform have focused on either white women or Black men.<sup>261</sup> The United States has more women incarcerated than any other country in the world—a full 30% of the incarcerated women globally.<sup>262</sup> Even more startling, Black women are twice as likely to be incarcerated as their white female peers.<sup>263</sup> The legal system must find ways to understand the complexities Black women face in society in order to overcome the inherent biases present in the criminal justice system today.

Any reform movements that do not include Black women will fail to bring meaningful change because they will be missing the most marginalized group.<sup>264</sup> White women and Black men “share a kind of narcissism that comes from being viewed as the most vulnerable entities within their respective races.”<sup>265</sup> Thus, both groups struggle to acknowledge that they still experience a certain level of privilege.<sup>266</sup> Therefore, it is only Black women—*Black feminists*—who can politically empower and transform the lived experiences of Black women.<sup>267</sup> If it were not for “bell hooks, Angela Davis, Alice Walker, Toni Morrison, Toni Cade Bambara, Barbara Smith, June Jor-

<sup>258</sup> *Id.* at 436.

<sup>259</sup> *Cf. id.* (arguing that the history of discrediting African Americans on the basis of their blackness based on stereotypes causes Black women to risk being “doubly disbelieved”).

<sup>260</sup> ASHA DUMONTHIER, CHANDRA CHILDERS, & JESSICA MILLI, *THE STATUS OF BLACK WOMEN IN THE UNITED STATES* 119 (2017).

<sup>261</sup> *See id.* The focus on gender typically centers on only white women, and the focus on race only includes Black men. The unique experiences of Black women usually fall somewhere between the two, never to be addressed.

<sup>262</sup> Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/women/2018.html> [<https://perma.cc/NQ5B-4AJV>]; *see also* Sandra Enos, *Another War on Women: Mass Incarceration, Gender and Color*, 43 INT’L REV. MOD. SOC. 33, 42 (2017).

<sup>263</sup> Roberts, *supra* note 168, at 13.

<sup>264</sup> *See* ROBIN E. FIELD, *WRITING THE SURVIVOR: THE RAPE NOVEL IN LATE TWENTIETH-CENTURY AMERICAN FICTION* 34 (2020).

<sup>265</sup> Cooper, *supra* note 241, at 187.

<sup>266</sup> *See id.*; *see also* King, *supra* note 46, at 58 (stating feminism has excluded and devalued Black women, their experiences, and their “interpretations of their own realities at the conceptual and ideological level.”).

<sup>267</sup> *See, e.g.*, Cooper, *supra* note 241, at 35 (“Black feminism is about the world Black women and girls can build, if all the haters would raise up and let us get to work.”)

dan, Audre Lorde, Barbara Christian, and many more," Black girls would not exist.<sup>268</sup> It is the activist efforts of Black girls and women that have created hashtags such as #SayHerName, #LoudBlackGirls, and #BlackGirlMagic to push back on the persistent invisibility and devaluation of the Black woman's body.<sup>269</sup> The source of the Black woman's power stemming from pain and resilience politically empowers her to change social circumstances for those who look like her, "understanding that in doing so, she will change things for everyone because she lives on the fringe."<sup>270</sup> Per Deborah K. King, "The necessity of addressing all oppressions is one of the hallmarks of Black feminist thought."<sup>271</sup>

Scholars such as Ashley Smith insightfully argue that authority figures throughout the justice system should be held accountable by learning about their own biases and expanding their cultural awareness of Black girls.<sup>272</sup> This knowledge is necessary to understand how structural state violence and racialized and gendered discipline practices combine to shape detrimental experiences for Black women and girls.<sup>273</sup> Smith believes that neo-capital punishment ideology<sup>274</sup> and intersectionality<sup>275</sup> are the starting points for understanding how systemic and institutionalized policies and practices normalize unwarranted violence as a result of Black women and girls' subordinate positioning and behaviors.<sup>276</sup>

The criminal justice system must do more to understand the unique experiences of Black women. Studies about women in crime and punishment virtually ignore the experiences of Black women, and research in Black criminality focuses almost exclusively on men.<sup>277</sup> Scholars such as Stephanie Hong propose reform initiatives like overruling current mandatory sentencing policies, addressing employment discrimination, and implementing com-

<sup>268</sup> Maisha T. Winn & Stephanie S. Franklin, *Emerging from Our Silos: Coalition Building for Black Girls*, 453 COUNTERPOINTS: FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 113, 121 (2014).

<sup>269</sup> Ashley L. Smith, *#BlackWomenMatter: Neo-Capital Punishment Ideology in the Wake of State Violence*, 85 J. NEGRO EDUC. 261, 269 (2016).

<sup>270</sup> Winn & Franklin, *supra* note 268, at 122.

<sup>271</sup> King, *supra* note 46, at 43.

<sup>272</sup> See Smith, *supra* note 269, at 269.

<sup>273</sup> See *id.*

<sup>274</sup> Described as a theoretical construct detailing indocile (disobedient) acts by Black women and girls which result in neither institutionally sanctioned nor legally justified discipline. *Id.* at 261.

<sup>275</sup> Defined as the connection of race, gender, class, and sexuality, focusing on the ways these direct identities maintain injustice. *Id.* at 264–65.

<sup>276</sup> *Id.* at 269.

<sup>277</sup> See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 5 (1995); Stephanie Hong, *Say Her Name: The Black Woman and Incarceration*, 19 GEORGETOWN J. GENDER & L. 619, 642 (2018) (arguing that despite the growing prominence of mass incarceration in the national discourse, the most marginalized and vulnerable individuals are left out of the conversation – instead, more attention is given to white women and Black men).

munity-based approaches to promote social organization.<sup>278</sup> Other scholars believe that a reformist approach fails to critically address the fact that the system itself sustains the “gendered racist power relations of chattel slavery, colonial conquest, and white-supremacist nation-building.”<sup>279</sup> There are valid points on both sides. Criminal justice reform is needed, but simply changing laws within a sexist and racist system will do nothing to improve it.<sup>280</sup> The first step must be to change the narrative of Black women as hypersexualized Jezebels deserving of punishment. In order to successfully protect Black women, judges and lawmakers must understand the unique experiences they encounter in society and how slavery and the hypersexualization of Black women’s bodies impact their relative value today.<sup>281</sup> In other words, we must work to change the foundation, not just a symptom of the problem.

Changing the narrative should not occur solely within courts and legislatures. It should begin with social change spearheaded by Black women. Most legal scholarship is invested in centering courts, executives, and legislatures as the places where reform happens.<sup>282</sup> However, legal scholarship minimizes the disconnect between legal institutions and the public.<sup>283</sup> Law enforcement and courts’ inability to see Black women and girls as victims is only part of the problem. Focusing solely on the State and the criminal justice system neglects the interconnectedness of the public and private spheres.<sup>284</sup> Because “the problems facing Black communities cross the public-private divide, . . . so must the solutions.”<sup>285</sup> Prosecutors and police should not be the only targets within law reform conversations: public institutions, such as “schools, health care, and jobs must also be targets for reform.”<sup>286</sup> At this stage, it is unclear exactly what reform should look like. But, proponents of reform surely should not rely on white men and the criminal justice system to fix the problem they themselves created. White men,

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<sup>278</sup> Hong, *supra* note 277, at 633.

<sup>279</sup> See Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1598 (2019).

<sup>280</sup> Cf. Dean Spade, *Keynote Address*, 19 COLUMBIA J. GENDER & L. 1086, 1093 (2010) (changing the language of homophobic statutes without addressing the underlying homophobia only serves to strengthen the criminal punishment system by allowing it to appear fair and neutral); see also Edmonds, *supra* note 207, at 45 (arguing that more vigorous enforcement of existing rape law without combating racial oppression will exaggerate the concealed sexism and racism in the law).

<sup>281</sup> See Devon W. Carbado & Cheryl L. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2221–23 (2019) (discussing *DeGraffenreid v. General Motors Assembly Division*, 413 F. Supp. 142 (E.D. Mo. 1976), where a court refused to recognize Black women as a discrete group because it could not understand that Black women experience unique discrimination).

<sup>282</sup> Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 414 (2018).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 431.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

after all, have always been the chief actors of the American project of white supremacy.<sup>287</sup>

This context is important to better understand the significance of Chrystul Kizer's case. As this paper is being written, Ms. Kizer is currently waiting for the Wisconsin Court of Appeals to decide whether she can assert legal protections under Wisconsin Statute §939.46(1m).<sup>288</sup> The Wisconsin legislature passed this statute in 2018 to provide victims of human trafficking a legal defense for "any offense" committed as a "direct result" of the person's status as a trafficking victim regardless of whether the alleged trafficker has been charged or convicted.<sup>289</sup> Similar to the TVPA and the DVSJA, Wis. St. §939.46(1m) was meant to protect all women who are victims, as defined by the statute.

Chrystul Kizer's ability to assert the affirmative defense under Wis. St. §939.46(1m) requires an interpretation of the statutory language and the legislative intent. A plain text reading of "any offense" would likely lead most people to conclude that the legislature meant for *any* offense to be protected under §939.46(1m). However, the trial judge in Ms. Kizer's case adopted a different approach to the word "any." On January 23, 2020, the Honorable David Wilk found the language of §939.46 to be "ambiguous," ruling that the affirmative defense under §939.46(1m) is only available to a defendant charged with one of the acts listed in §940.302(2).<sup>290</sup> According to Judge Wilk, "any offense" is an ambiguous term and, because of this ambiguity, it can only be applied to commercial sex crimes that fall within the human trafficking statute.<sup>291</sup> It would benefit no one to speculate as to Judge Wilk's intention behind this ruling—even people with good intentions can be casteist and continue to maintain the social hierarchy.<sup>292</sup> Nonetheless, Judge Wilk's framing is exemplary of how a judge can seemingly ignore the circumstances that made a young girl such as Ms. Kizer a victim if they do not first understand how the dehumanization of Black girls through hypersexualization uniquely presents itself. For example, even though Ms. Kizer testified to being forced to engage in sexual relations with Volar as a minor, *and*, as previously discussed, the police discovered twenty "home videos" of Volar raping young Black girls, the aforementioned state prosecutor said he was "aware of no evidence of [Volar's] involvement in sex trafficking or any-

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<sup>287</sup> See COOPER, *supra* note 241, at 63 ("White women have absolutely been accomplices to the American project of white supremacy, but their husbands, brothers, fathers, and sons have always been the masterminds.")

<sup>288</sup> See Wi. St. § 939.46 (effective as of March 30, 2018).

<sup>289</sup> See *id.*

<sup>290</sup> Order of Interpretation and Use of the Affirmative Defense Under §939.46(1m), *supra* note 5, at 101; State v. Kizer, Wisconsin Circuit Court, No. 18 CF 642, (Jan. 23, 2020). §940.302(2) is Wisconsin's criminal human trafficking statute, which criminalizes the engagement in and financial benefit from human trafficking. The language of this statute indicates that its purpose was likely for traffickers, not for those who are trafficked. See *id.*

<sup>291</sup> See *id.* (referencing Wis. Stat. Ann. § 940.302(2)).

<sup>292</sup> See WILKERSON, *supra* note 16, at 71.

thing characterized as sex trafficking beyond him just being a person postured as a customer.”<sup>293</sup>

The statements of the Wisconsin prosecutor and the trial judge’s refusal to allow Ms. Kizer to assert the affirmative defense express a lack of understanding of the implicit biases that hypersexualize and simultaneously devalue Black women and girls and are part of the evolving and enduring social construct that dates back to the slavery era. Researchers have found that, by adulthood, most Americans have been exposed to enough negative messages about Black people that as much as 80 percent of white Americans hold unconscious bias against Black Americans.<sup>294</sup> This bias is so automatic that it kicks in before a person can process it.<sup>295</sup> Even if the bias is unconscious, failing to even acknowledge that Ms. Kizer is a human trafficking victim is the result of a bias towards perceiving Black girls as hypersexualized beings instead of the victims they truly are. Sociologists have expressed that a person can have no explicit racial prejudices but still hold implicit bias deep in their subconscious because of the negative images society continues to perpetuate.<sup>296</sup> It is these implicit biases that may have caused Judge Wilk to deny Ms. Kizer even the chance to assert the trafficking victims’ affirmative defense and these biases that have likely caused the prosecutor and Kenosha police to characterize Ms. Kizer and Volar’s other victims as voluntarily prostituting themselves—as if they themselves chose to be trafficking victims.

Because Ms. Kizer’s fate has yet to be decided, her case affords a unique opportunity; it could be the first in a paradigm shift towards applying statutes created to protect all women and using them to protect Black women. However, simply applying statutes without addressing the racist undertones will only leave the next Black victim vulnerable. Because of the peculiar origins and the continual reinforcement of this construct, the current criminal justice system is not apt to protect Black girls. Nevertheless, one step in the right direction could save Ms. Kizer’s life, even if it is not a permanent solution.

## CONCLUSION

Hundreds of years of devaluation and prosecution are so entrenched in the system that they have become one and the same. Black women and girls are prosecuted for prostitution at higher rates than their white counterparts, even though, legally, girls under the age of eighteen cannot consent to engage in prostitution.<sup>297</sup> The prosecutor and judge in Nashville originally gave

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<sup>293</sup> State v. Kizer, Brief of Plaintiff-Respondent, dated September 4, 2020, p. 10.

<sup>294</sup> WILKERSON, *supra* note 16, at 186–87 (quoting from author interview with David R. Williams, Providence, R.I. (May 29, 2013)).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 187.

<sup>297</sup> See, e.g., MacKinnon, *supra* note 143, at 283; Hurst, *supra* note 142, at 92.

Cyntoia Brown no protection as a child trafficking victim, instead requiring her to serve fifteen years of a life sentence for killing a man who paid to rape her.<sup>298</sup> Melissa Alexander received a longer prison sentence for firing a non-lethal warning shot at her abuser than men who have murdered their wives.<sup>299</sup> The TVPA, created to protect victims of human trafficking, disproportionately fails to protect Black girls even though Black girls are more likely to be human trafficking victims.<sup>300</sup> New York's DVSJA was enacted to provide protections for victims of intimate partner violence, but Black women are less likely to have the necessary documentation required to qualify and are more likely to be disbelieved by judges.<sup>301</sup> Finally, there's Chrystul Kizer. Instead of receiving the aid and care a trafficking victim desperately needs, Ms. Kizer is facing a murder charge and life in prison for allegedly protecting herself against her trafficker.<sup>302</sup> And she has been denied the right to even assert to the jury the legal protection that was created for human trafficking victims such as herself. From all of this, one thing is clear: the criminal justice system as it stands today cannot protect Black women and girls.

It is time for a reformation. American society needs a system that does not have the stains and remnants of chattel slavery overshadowing every law and judicial decision affecting survivors. However, this reformation can only be successfully achieved if it is led by Black women. Because Black women are at the lowest rung of the social-caste ladder, creating laws that protect and benefit Black women will inevitably benefit all people. As the saying goes, a rising tide lifts all boats.

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<sup>298</sup> See Hauser, *supra* note 10.

<sup>299</sup> See Peoples, *supra* note 179; Keller, *supra* note 177, at 256.

<sup>300</sup> See, e.g., Phillips, *supra* note 214, at 1645–46.

<sup>301</sup> As discussed *supra*, because Black women are less likely to report domestic violence, they are less likely to obtain the documentation needed under the DVSJA. See, e.g., Martinson, *supra* note 236, at 269; see also CPL § 440.47(2)(c).

<sup>302</sup> Contrera, *supra* note 1.

