# JUST ANOTHER FAST GIRL: EXPLORING SLAVERY'S CONTINUED IMPACT ON THE LOSS OF BLACK GIRLHOOD

MIKAH K. THOMPSON*



* Associate Professor of Law, University of Missouri-Kansas City. I would like to thank my colleagues at the UMKC School of Law for all of your support throughout the years. The editors of the *Harvard Journal of Law and Gender* provided superb editorial suggestions, and I thank them for their hard work and patience during the editing process. All errors are mine. This piece is dedicated to Patricia Roberson Lipsey, my mother and my first love. Thank you for teaching me to embrace the beauty and complexity of my Blackness and my womanhood. Finally, I would like to thank my husband, Brandon P. Thompson, and our four children, Rashai, Myah, Maxwell, and Ethan. You are my greatest blessings. Thank you for always being my champions.

## Introduction

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

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

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

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

---

[1] Elexus Jionde, *How Young, Black Girls Were Hypersexualized in America – And How That Enables Predators*, Bustle (Jan. 9, 2019), https://www.bustle.com/p/how-young-black-girls-were-hypersexualized-in-america-how-that-enables-predators-15727529 [https://perma.cc/39XE-F3SV].

[2] *See* Dianne Smith et al., *Three Black Women Remembering Womanish Girls*, *in* Womanish Black Girls: Women Resisting the Contradictions of Silence and Voice 1 (Dianne Smith et al. eds., 2019) (explaining that in the south, the term "womanish" was used to describe girls who were "too fast, too hot, and waiting for trouble.").

girls.[3] When Kelly was tried on child pornography charges in 2008, he was acquitted, and at least one of Kelly's jurors has indicated that his perceptions of Kelly's alleged victims affected his vote.[4] When asked about his assessment of the women's testimony, he stated, "I just didn't believe them. I know it sounds ridiculous. The way they dress, the way they act. I didn't like them. I disregarded all what they said."[5] This juror perceived Kelly's alleged victims to be fast girls and women who were unworthy of belief and perhaps undeserving of the law's protection.

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

## I. The Stereotypic Connection between Blackness and Promiscuity

One of the hallmarks of the era of chattel slavery is the set of perceptions slave owners and others utilized to justify the brutality of the institution. Stereotypes regarding the hypersexuality of Black girls and women served to rationalize and decriminalize the sexual violence[6] committed

---

[3] *See* Kyle Eustice, *R. Kelly Secretly Marries 15-year-old Aaliyah 22 Years Ago Today*, The Source (July 31, 2016), https://thesource.com/2016/07/31/r-kelly-secretly-marries-15-year-old-aaliyah-22-years-ago-today/ [https://perma.cc/HT92-V4JT]; *see also* Jionde, *supra* note 1 (stating that copies of a video allegedly showing Kelly engaging in sex acts with a fourteen-year-old were sold in Black communities across America starting in 2002 and that Kelly's popularity soared during this time period).

[4] *See* Shani Saxon, *'Surviving R. Kelly': Powerful Docuseries Is a Reckoning for the Singer – And Us*, Rolling Stone (Jan. 3, 2019, 12:37 PM), https://www.rollingstone.com/tv/tv-features/surviving-r-kelly-lifetime-docuseries-review-774317/ [https://perma.cc/NT62-XQJF].

[5] *Id.*

[6] I use the term "sexual violence" to reference all types of sex-based crimes, including rape, sexual assault, and sexual exploitation. "Sexual assault" is defined as "sexual contact or behavior that occurs without explicit consent of the victim." *Sexual Assault,* The Rape Abuse and Incest National Network (RAINN), https://www.rainn.org/articles/sexual-assault [https://perma.cc/6WFS-XJG6] (May 16, 2020). Some forms of sexual assault include attempted rape, unwanted sexual touching, forcing an individual to perform sexual acts, and penetration of an individual's body, also known as rape. *Id.* Rape, which is one form of sexual assault, is defined as sexual penetration without consent. *Id.* This article addresses various categories of rape, including stranger rape, acquaintance or date rape, and statutory rape. I use the term "sexual exploitation" to

against them.[7] Even after slavery was abolished, the justice system failed to protect Black girls and women.[8] Today, these slavery-era perceptions and stereotypes continue to persist, particularly with regard to Black girls. Society tends to view Black girls as less innocent and more sexually advanced than White girls.[9] This Section will explore the origins of the Black promiscuity stereotype and demonstrate its prevalence in modern society.[10]

### *A. Black Hypersexuality as a Justification for Sexual Violence During Slavery*

> *I now entered on my fifteenth year—a sad epoch in the life of a slave girl. My master began to whisper foul words in my ear. Young as I was, I could not remain ignorant of their import. . . . He peopled my young mind with unclean images, such as only a vile monster could think of. I turned from him with disgust and hatred. But he was my master. I was compelled to live under the same roof with him—where I saw a man forty years my senior daily violating the most sacred commandments of nature.*[11]

In her memoir *Incidents in the Life of a Slave Girl: Written by Herself*, Harriet Jacobs details her life as a slave.[12] She describes the ways in which her master's sexual advances impacted her girlhood beginning at age fifteen.[13] Even at such a young age, Jacobs understood that her status as an enslaved girl negated any right she had to refuse her master and guaranteed that no law would safeguard her innocence.[14]

Jacobs's understanding of her rights is consistent with slavery-era law, which generally failed to recognize rape against Black girls and women as a crime.[15] Legislators in both northern and southern states enacted laws that

---

reference the act of taking sexual advantage of another person, oftentimes where a power differential exists between victim and offender.

[7] *See* Section I.A., *infra*.

[8] *See* Section I.B., *infra*.

[9] *See* Section I.C., *infra*.

[10] While this article focuses on the ways in which stereotypes affect society's treatment of Black girls and women who make accusations of rape, it is important to note that throughout our country's history, sexual assault victims of other races have also experienced mistreatment based on racial and ethnic stereotypes. *See* Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 101 n.212 (1987) (referencing S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 150 (1976) to describe the rapes of Native American "squaws" by White men as well as negative treatment of Mexican-American and Asian-American rape victims).

[11] HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF SLAVE GIRL: WRITTEN BY HERSELF 27 (Yellin ed. 2000).

[12] *See generally id.*

[13] *Id.* at 27.

[14] *Id.*

[15] *See* Jeffrey A. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 8 (2006)

criminalized rape only when the victim was White.[16] Indeed, a failure to allege that a victim was White could result in the dismissal of rape charges, even where the defendant was a slave.[17]

Slavery-era laws did impose punishment for intraracial rape involving enslaved persons but typically failed to label the act as rape. As the defendant's attorney argued in *George (a slave) v. State*, an 1859 case involving the alleged sexual assault of an enslaved girl under the age of ten, "[t]he crime of rape does not exist in this State between African slaves. . . . [T]heir intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery."[18] Obviously persuaded by counsel's argument, the *George* court held that "there is no act which embraces either the attempted or actual commission of rape by a slave on a female slave."[19] In another 1859 case, a Mississippi appellate court suggested that the rape of an enslaved person might constitute a trespass against the master.[20] Although the Mississippi legislature eventually passed a law explicitly criminalizing the rape of enslaved girls under the age of twelve and making the crime punishable by death or whipping, the law applied only when the rape was attempted or committed by a Black person.[21]

Though the rape of enslaved girls and women by White men was common and "a crucial weapon of white supremacy,"[22] the law failed to criminalize this conduct.[23] Slavery-era publications and slave narratives indicate that enslaved girls began to experience sexual violence at or near the

("Raping a Black woman was not a crime for the majority of this Nation's history. First, the rape of a Black woman was simply not criminalized. And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and Court holdings made clear the lack of recourse for Black women who were raped." (footnote omitted)).

[16] *See* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105 n.8 (1983) (citing Alabama Code of 1852, Mississippi 1857 Statute, and Tennessee 1858 Law, Pennsylvania Code of 1700, and Kansas Compilation of 1855). *But see* Warren v. State, 336 S.E.2d 221, 225 (Ga. 1985) (citing an 1863 Georgia statute defining rape as "'the carnal knowledge of a female whether free or slave, forcibly and against her will.'"). Wriggins notes that in jurisdictions where the race of the victim was not included in the legislative definition of rape, law enforcement typically ignored the rape allegations of Black women, leaving them with no legal recourse. Wriggins at 106.

[17] *See* State v. Charles, 1 Fla. 298, 335–37 (1847) (affirming dismissal of criminal charges against a slave where the government's indictment failed to state that the victim was White); *accord* Commonwealth v. Mann, 4 Va. 210, 210 (Va. 1820).

[18] George v. State, 37 Miss. 316, 317 (Miss. 1859).

[19] *Id.* at 320.

[20] Minor v. State, 36 Miss. 630, 632 (Miss. 1859).

[21] George, 37 Miss. at 320 ("[T]he actual or attempted commission of a rape by a negro or mulatto on a female negro or mulatto, under twelve years of age, is punishable with death or whipping, as the jury may decide." (citing Mississippi Session Acts of 1860, ch. 62, 1860 Miss. Laws.)); *see also* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860 306 (1996) (describing two Virginia cases from the late eighteenth century wherein male slaves were indicted for raping female slaves but noting that such cases were "rare" and "unique").

[22] Wriggins, *supra* note 16, at 118. Wriggins notes that White men had "institutionalized access" to Black women during slavery. *Id.*

[23] MORRIS, *supra* note 21, at 305 ("[N]o white could ever rape a slave woman.").

start of puberty. While Jacobs describes a change in her master's treatment of her beginning at age fifteen,[24] other narratives indicate that enslaved girls were expected to begin bearing children and thus became the targets of their masters' sexual advances starting as early as age twelve.[25]

In her book *When Rape Was Legal*, Rachel Feinstein posits that slave owners routinely raped enslaved girls and women, not just for their own sexual gratification, but also "to control, humiliate, and degrade enslaved women and men, increase slave labor and property by impregnating the women, and provide[ ] an avenue for white male bonding and white masculine performances."[26] Of particular importance was the slave holders' economic incentive to rape and impregnate their female slaves. Because enslaved women's children were classified as slaves regardless of the status of the father, slave owners faced no negative repercussions for raping and impregnating their slaves.[27] Indeed, when the government ended the international slave trade in 1808, slave owners gained a new incentive to rape and force the breeding of slaves.[28] As Dorothy Roberts notes, "[W]henever a white man impregnated one of his slaves, the child produced by his assault was his property."[29] Thus, the rape of enslaved girls and women became "a wise investment strategy for cash-strapped slave owners interested in increasing the number of their slaves, even if they had to wait for the infants to become productive."[30] Importantly, Roberts states that while the economic incentives

---

[24] *See* JACOBS, *supra* note 11, at 44.

[25] *See On Slaveholders' Sexual Abuse of Slaves: Selections from 19th- & 20th-century Slave Narratives*, National Humanities Center Resource Toolbox, 3 (2007), http://nationalhumanitiescenter.org/pds/maai/enslavement/text6/masterslavesexualabuse.pdf [https://perma.cc/E6X3-GBG8] (citing narrative of Hilliard Yellerday, formerly enslaved in North Carolina); *see also* MELTON A. MCLAURIN, CELIA, A SLAVE: A TRUE STORY OF VIOLENCE AND RETRIBUTION IN ANTEBELLUM MISSOURI 20–21 (1991) (stating that Celia's owner purchased her when she was approximately fourteen years old and raped her almost immediately, commencing a relationship of sexual violence and exploitation that would continue for five years).

[26] RACHEL A. FEINSTEIN, WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY 16 (2019). Feinstein notes that some slave owners used rape as a male bonding experience by inviting their friends to participate in acts of sexual violence. *Id.*

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

[28] *See* The Emily, 22 U.S. 381, 385 (1824) (citing the act of the 2d of March, 1807, c. 77. [lxvii.] "to prohibit the importation of slaves into the United States after the 1st of January, 1808."); *see also* FEINSTEIN, *supra* note 26, at 21 (stating that owners forced male and female slaves to have sex in order to reproduce and finding that enslaved women who were fertile were valued between one-sixth and one-fourth more than women who could not bear children).

[29] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 29 (1999).

[30] Bridgewater, *supra* note 27, at 119.

were significant, the rape of enslaved girls and women by their owners was, at its most basic level, a dehumanizing act of terror that reinforced notions of White supremacy.[31]

White society rationalized the rape and forced breeding of slaves by promoting stereotypes about Black sexuality. They viewed enslaved men and women as lustful and naturally promiscuous.[32] In particular, White society's perceptions of Black girls and women were consistent with the Jezebel stereotype, defined as an immoral, hypersexual being who was essentially unrapeable.[33] Described as the "bad-black-girl," the Jezebel is "alluring and seductive as she either indiscriminately mesmerizes men and lures them into her bed, or very deliberately lures into her snares those who have something of value to offer her."[34] Importantly, stereotypes about Black sexuality like the Jezebel impacted society's perceptions of enslaved children, with some Whites believing that Africa's warm climate accelerated the physical development of Black children.[35]

The prevalence of these myths resulted in White society blaming enslaved girls and women for the sexual violence perpetrated against them.[36] Indeed, some White women were jealous and resentful of the enslaved women whom they perceived as so immoral and alluring that they enticed White men to have sex with them.[37] As historian Winthrop D. Jordan notes, "[n]ot only did the Negro woman's warmth constitute a logical explanation for the white man's infidelity, but, much more important, it helped shift responsibility from himself to her. If she was *that* lascivious—well, a man could scarcely be blamed for succumbing against overwhelming odds."[38] Based in part on their perceptions of the hypersexuality of enslaved girls and

---

[31] ROBERTS, *supra* note 29, at 29.

[32] *See* Bridgewater, *supra* note 27, at 116 ("Many members of the slave society excused the abuse by subscribing to a set of beliefs that characterized African female slaves as lascivious and immoral. They viewed female slaves as female counterparts of an exaggerated image of the African male slave: enormously physically powerful, dumb, and animalistic.").

[33] *See* Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, 2 (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf [https://perma.cc/79TE-E79R] (describing the common perception that "Black women's innate hypersexuality made them 'unrapeable' and underserving of protection or sympathy."); *see also* ROBERTS, *supra* note 29, at 10–11 (noting that the Jezebel stereotype was named after the biblical wife of King Ahab, a woman who was a "purely lascivious creature: not only was she governed by her erotic desires, but her sexual prowess led men to wanton passion").

[34] Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 636 (2000).

[35] *See* William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI. KENT L. REV. 1051, 1063 (1993) (citing State v. Lewis, 60 N.C. 300, 302 (1864)).

[36] Bridgewater, *supra* note 27, at 116.

[37] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 151 (1968).

[38] *Id.* (emphasis in original).

women, White women sometimes reacted to their husbands' unfaithfulness by physically abusing female slaves and murdering or selling their children.[39]

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

In 1865, Congress passed and the states ratified the Thirteenth Amendment, which abolished slavery.[40] In 1866, Congress passed the Fourteenth Amendment, which purported to provide the formerly enslaved population with equal protection under the law, and the states ratified the Fourteenth Amendment in 1868.[41] For non-White rape victims, the enactment of the Fourteenth Amendment meant that the laws criminalizing rape would protect them regardless of their race.[42] Despite the promises of the Thirteenth and Fourteenth Amendments, Black girls and women continued to experience sexual violence, and the justice system often failed to hold their assailants accountable.

Black girls and women experienced rape and other forms of sexual violence in a variety of contexts following the end of slavery. Scholars have suggested that Black women were more vulnerable to rape as compared to their White counterparts because they worked outside the home, exposing them to the sexual advances of their employers.[43] Additionally, domestic terrorists, including the Ku Klux Klan, subjected Black girls and women to rape as a part of their larger campaigns of violence against Black people.[44]

---

[39] *See* FEINSTEIN, *supra* note 26, at 60.

[40] U.S. CONST. amend. XIII, § 1. Notably, the Thirteenth Amendment did not abolish slavery "as a punishment for crime." *Id.* Although President Abraham Lincoln's Emancipation Proclamation freed enslaved people in 1863, many believed the proclamation was unconstitutional. *See* Adam M. Carrington, *Running the Robed Gauntlet: Southern State Courts' Interpretation of the Emancipation Proclamation*, 57 AM. J. LEG. HIST. 556, 556–57 (2017). Lincoln's concern about legal challenges to the Emancipation Proclamation necessitated passage of the Thirteenth Amendment. *See id.*

[41] U.S. CONST. amend. XIV, § 1.

[42] *See* Pokorak, *supra* note 15, at 21–22 (stating that, "[a]lthough the passage of the Thirteenth Amendment was sufficient to end slavery and was a reasonable basis for the end of *de jure* criminal discrimination, the passage of the Fourteenth Amendment pointedly abolished the statutory assignment of different punishments for rapes committed by different races."). Pokorak notes that supporters of the Amendment argued that "[f]ailure to enact the Fourteenth Amendment was considered equivalent to re-enslavement." *Id.* at 21.

[43] *See* Wriggins, *supra* note 16, at 119; *accord* Bridgewater, *supra* note 27, at 129 ("Many black women who worked as domestics in the homes of whites were, like their enslaved ancestors, vulnerable to sexual abuse.").

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

These groups sometimes sexually assaulted Black women in the presence of their husbands, who were unable to intervene.[45] Black girls were not spared from the sexual violence of domestic terror groups, with girls as young as twelve years of age being raped and at times gang-raped by klansmen.[46] As one researcher notes, these "groups of white men [were] impelled to violence by a complex of racial and sexual animus."[47]

While sexual violence remained a problem in the post-Civil War period, prosecutors typically failed to take seriously reports that a Black woman had been raped.[48] The justice system's reluctance to prosecute cases involving Black victims, especially in light of the robust, albeit racist, impulse to prosecute and sometimes execute Black men for allegedly raping White women,[49] suggests that slavery-era stereotypes and myths concerning the promiscuity of Black girls and women had a major impact on law enforcement authorities.

Perceptions about the hypersexuality of Black men and women remained intact during the Jim Crow era. Jennifer Wriggins notes that the legal system reinforced the stereotype that Black girls and women were promiscuous.[50] She cites *Dallas v. State*, a 1918 Florida Supreme Court case wherein the court considered whether it was appropriate for the trial court to presume the chastity of a White girl who was an alleged victim of statutory rape.[51] The court stated that although it would be rare to find an unchaste girl of the "Caucasian race," "we would blind ourselves to actual conditions if we adopted this rule where another race that is largely unmoral constitutes an appreciable part of the population."[52]

Post-Civil War courts displayed a tendency to consider chastity when assessing all types of rape allegations involving Black girls. Because Black girls were perceived as sexually promiscuous, the chastity requirement meant that naturally unchaste Black girls could not be raped.[53] Mary Frances

---

[45] *Id.* at 721–22.

[46] *Id.* at 729–30. Cardyn notes that klansmen also raped and sodomized Black men and boys as acts of terror. *Id.* at 735.

[47] *Id.* at 730.

[48] Pokorak, *supra* note 15, at 22 ("[A]lthough statutes facially included victims of all races, raping a Black woman remained a crime not worthy of [a] prosecutor's attention or effort. The experience for Black women was the same under either legal regimen—no legal outlet for vindication of the most egregious violations.").

[49] *See* Taylor, *supra* note 10, at 106 (stating that the stereotype of "the black rapist preying on defenseless white women" resulted in approximately 5,000 lynching deaths between 1882 and 1946). Taylor notes that lynch mobs sometimes employed the stereotype as a political tactic, often falsely accusing Black men of raping White women in order to justify violence against freedmen. *Id.*

[50] Wriggins, *supra* note 16, at 121.

[51] *See* Dallas v. State, 79 So. 690, 691 (Fla. 1918). Under Florida law, an essential element of the crime of statutory rape was proof that the female was "of previous chaste character." *Id.*

[52] *Id.*

[53] Wriggins, *supra* note 16, at 121 ("Because of the way the legal system considered chastity, the association of Black women with unchastity meant not only that Black wo-

Berry explains that individuals accused of raping children often defended their actions by attempting to prove consent, particularly when the child was close to the age of majority.[54] According to Berry, when the children were Black, "the theme of racial promiscuousness embellished the defendant's tale of enticement."[55] She describes an 1879 case where a White man named Conrad Anschicks was accused of raping Liney King, a three-and-a-half-foot tall Black girl whose exact age could not be determined.[56] Although Liney believed she was ten or eleven years old, her father, a former slave, had no records to prove her date of birth.[57] Unable to establish that Liney was under ten, the age of consent in Texas at the time, the prosecution sought to prove forcible rape.[58] Anschicks responded by offering the testimony of White witnesses that Liney was "very forward" around him and dressed and behaved like a woman.[59] Although a jury convicted Anschicks, the Texas Court of Appeals found that the prosecution did not prove the absence of consent by Liney and overturned the conviction.[60] Berry argues that the court's ruling "reinforced the social order: white men could indulge themselves sexually with black women and girls."[61]

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

Before determining whether the social order described by Berry persists today,[62] it is necessary to explore modern-day perceptions concerning the sexuality of Black girls and women. Researchers have firmly established that the Jezebel stereotype perseveres today. Roxanne Donovan and Michelle Williams argue that modern-day perceptions of Black women, including stereotypical images such as "welfare queens, hoochies, freaks, and hoodrats" can find their origins in the Jezebel stereotype.[63] They assert that regardless of the name, these stereotypes convey the message that Black

men could not be victims of statutory rape, but also that they would not be recognized as victims of forcible rape.").

[54] MARY FRANCES BERRY, THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT 180 (1999).

[55] *Id.*

[56] *Id.* at 180–81.

[57] Anschicks v. State, 6 Tex. App. 524, 526 (Tex. Ct. App. 1879); *accord* BERRY, *supra* note 54, at 181. Because the state could not prove Liney's age, the defendant was not charged with statutory rape. *Id.*

[58] BERRY, *supra* note 50, at 181.

[59] Anschicks, 6 Tex. App. at 529.

[60] *Id.* at 541.

[61] BERRY, *supra* note 54, at 182.

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

[63] Roxanne Donovan & Michelle Williams, *Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors*, 25 WOMEN & THERAPY 95, 98 (2002).

women are "sexually available and sexually deviant."[64] Media portrayals, including music videos, rap songs, and movies, reinforce these perceptions of Black women.[65] In support of their argument, Donovan and Williams reference a study wherein college students were shown sexually seductive rap videos featuring Black women.[66] After watching the videos, the students were more likely to describe Black women as "indecent, sleazy, and sluttish."[67] Similarly, Kimberlé Crenshaw argues that long-held stereotypes about the hypersexuality of Black women have rendered them virtually unrapeable, just as they were deemed during slavery.[68]

To be sure, these modern-day stereotypes of Black women also impact Black girls. A 2017 Georgetown Law Center on Poverty and Inequality study, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, found that adults view Black girls as less innocent than their White counterparts.[69] The study concluded that "Black girls were more likely to be viewed as behaving and seeming older than their stated age; more knowledgeable about adult topics, including sex; and more likely to take on adult roles and responsibilities than what would have been expected for their age."[70] While the "adultification" of Black girls starts as early as age five, it peaks between the ages of ten and fourteen and continues through age nineteen.[71] Because adults view Black girls as older and more knowledgeable about adult topics, they are less likely to believe that Black girls are innocent and in need of protection.[72] The adultification of Black girls likely impacts their

---

[64] *Id.*; *see also* Carolyn M. West, *Still on the Auction Block: The (S)exploitation of Black Adolescent Girls in Rap(e) Music and Hip-Hop Culture*, *in* THE SEXUALIZATION OF CHILDHOOD: CHILDHOOD IN AMERICA 89, 91 (Sharna Olfman ed., 2009) ("Just like their enslaved ancestors, contemporary black women's bodies are accessible, exchangeable, and expendable on the new cyber-auction block.").

[65] Donovan & Williams, *supra* note 63, at 98; *accord* West, *supra* note 64, at 91 (arguing that certain types of rap music glorify misogyny in the form of sexual and physical violence against women and portray scantily clad women as "sexualized status symbols").

[66] Donovan & Williams, *supra* note 63, at 98 (citing Sun-Lin Gan et al., *Stereotyping Effect of Black Women's Sexual Rap on White Audiences*, 19 BASIC & APPL. SOC. PSY. 381, 381–91 (1997)).

[67] *Id.*

[68] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) ("Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot."); *see also* Section I.A., *supra*.

[69] REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 2 (Georgetown Law Center on Poverty and Inequality, 2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/2QLP-UZCL].

[70] *Id.* at 8.

[71] *Id.*

[72] *Id.* The adultification of Black girls robs them of their innocence. They also lose the latitude to make mistakes and learn from them and are instead held to adult standards of behavior. *Id.* at 6.

treatment in several areas, including school disciplinary processes, the juvenile justice system, and the criminal justice system.[73]

The *Girlhood Interrupted* study found that the adultification of Black girls is largely influenced by stereotypes that Black girls and women are aggressive, loud, sassy, and hypersexual.[74] The researchers noted that these contemporary perceptions harken back to the era of slavery, where stereotypes such as the Jezebel were prevalent.[75] Similarly, Monique Morris argues that the Jezebel stereotype has morphed into the perception that Black girls are "fast."[76] These perceptions have a significant impact on the maturation of Black girls, with "good" girls doing all they can to avoid being perceived as fast.[77] Additionally, the stereotype that Black girls are sexually promiscuous makes them more vulnerable to sexual predators, primarily because society often blames them for the sexual violence they experience.[78] Morris argues that school administrators' responses to the sexual exploitation of Black girls are sometimes impacted by judgments about the moral decency of the girls, including assessments of the type of clothing they wear.[79] These

---

[73] *Id.* at 8 ("[A]dultification may serve as a contributing cause of the disproportionality in school discipline outcomes, harsher treatment by law enforcement, and the differentiated exercise of discretion by officials across the spectrum of the juvenile justice system.").

[74] *Id.* at 5.

[75] *Id.* The researchers identified three stereotypes that influence the treatment of Black girls today: Sapphire, described as "emasculating, loud, aggressive, angry, stubborn, and unfeminine"; Jezebel, described as "hypersexualized, seductive and exploiter of men's weaknesses"; and Mammy, described as "self-sacrificing, nurturing, loving, asexual." *Id.*

[76] *See* MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 114–15 (2016); *see also* Smith et al., *supra* note 2, at 1 (stating that, in the south, a "womanish" girl was one who was "too fast, too hot and waiting for trouble (getting big without a ring on it)"); Jonita Davis, *A Study Found Adults See Black Girls as "Less Innocent," Shocking Everyone but Black Moms*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/07/13/a-study-found-adults-see-black-girls-as-less-innocent-shocking-everyone-but-black-moms/[https://perma.cc/E6X5-C3LE] ("[F]rom the time they are talking and walking, little black girls are deemed 'fast,' a word synonymous with promiscuity.").

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

[78] MORRIS, *supra* note 76, at 115 (stating that stereotypes about Black girls make them vulnerable to various forms of abuse). While it is true that sexual assault survivors are often blamed for the violence perpetrated against them regardless of their race, Black survivors also must contend with stereotypes concerning their sexuality. *See* Donovan & Williams, *supra* note 63, at 98 ("Research has shown that women, in general, are more likely to be blamed for their sexual assault if they were drinking, dressed in revealing clothing, or went to a man's apartment. Although Black women are susceptible to these rape myths, they are also burdened with the additional stereotype of Black women as promiscuous.").

[79] MORRIS, *supra* note 76, at 116.

judgments are consistent with the societal belief that fast girls, through their conduct, including their behavior as well as their clothing and makeup choices, make themselves more susceptible to rape.[80]

### *D. Black Sexuality and the Law of Statutory Rape*

Society's tendency to blame Black girls for their own sexual exploitation is especially concerning in the context of statutory rape. Statutory rape laws, which criminalize sexual contact with minors, reflect the belief that children lack the capacity to consent to sexual activity.[81] As Michelle Oberman notes, "[s]tatutory rape is criminal because, even though it might look different from the classic model of stranger rape, it is no less an appropriation of another's physical, moral and psychic autonomy."[82] Oberman argues that statutory rape laws serve two functions:

> The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability. It also represents a necessary complement to conventional rape law, which offers little protection to the teenager who, due to fear, confusion, coercion, or inexperience, has "consented" to unwanted sex.[83]

At first glance, it appears that statutory rape laws, which often impose a strict liability standard,[84] provide blanket protection for minors who might otherwise be subjected to sexual exploitation; however, the law's recognition of certain affirmative defenses to the crime of statutory rape demonstrates that protections may vary depending on the victim's race.

Several jurisdictions recognize mistake of age as an affirmative defense to statutory rape. For example, Illinois law states that a person accused of certain statutory rape offenses may assert the defense that he or she "reason-

---

[80] *See, e.g.,* Shaunda Fowler, *My Soul Looks Back and Wonders How I Got Over: A Womanish Black Girl Reclaiming Her Superpower*, *in* WOMANISH BLACK GIRLS: WOMEN RESISTING THE CONTRADICTIONS OF SILENCE AND VOICE 61, 65 (Dianne Smith et al. eds., 2019) (noting the advice the author received from her aunt when the author was a young girl: "Don't sit wid cho legs open, you gon' get raped!"); Jionde, *supra* note 1 (describing fast girls as girls who wore red lipstick and eye-catching clothing and noting that many members of society were unbothered by singer R. Kelly's alleged sexual exploitation of teenaged girls because "[t]o them, his victims were fast girls who didn't deserve justice.").

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

[82] *Id.* at 738.

[83] *Id.* at 710.

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

ably believed the person to be [seventeen] years of age or over."[85] Similarly, California courts have acknowledged good faith and reasonable mistake of age as a defense to statutory rape.[86] Alaska and Oregon statutes also provide for a reasonable mistake of age defense for certain types of statutory rape offenses.[87]

In addition to recognizing the mistake of age defense, the Model Penal Code provides for a promiscuity defense for certain statutory rape offenses.[88] Although the American Law Institute acknowledges that certain provisions of the Model Penal Code's section on sexual assault and related offenses are outdated and in need of revision,[89] the current version of the Code states that individuals accused of statutory rape may defend themselves by proving by a preponderance of the evidence that the victim "had, prior to the time of the

---

[85] 720 Ill. Comp. Stat. 5/11–1.70(b) (2011). This affirmative defense may be asserted in cases of criminal sexual abuse, defined as (1) sexual contact between an offender who is under the age of seventeen and a victim who is at least nine years of age but under seventeen years of age, and (2) sexual contact between a victim who is at least thirteen years of age but under seventeen years of age and an offender who is fewer than five years older than the victim. *Id.* at 5/11-1.50(b)–(c). The defense is also available to defendants charged with aggravated criminal sexual abuse, which is defined as sexual contact with a victim who is at least thirteen years of age but under seventeen years of age and an offender who is at least five years older than the victim. *Id.* at 5/11-1.60(d).

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

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

[88] *See* Model Penal Code § 213.6 (Am. L. Inst., 1980).

[89] *See Model Penal Code: Sexual Assault and Related Offenses,* Am. L. Inst., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/64T2-XV9T] (last visited Oct. 11, 2020).

offense charged, engaged promiscuously in sexual relations with others."[90] The drafters of the Code justified the use of this defense by asserting that the victim's prior sexual promiscuity "rebuts the presumption of naivete and inexperience" that supports the criminalization of statutory rape.[91] While all states have declined to adopt the Model Penal Code's promiscuity defense and amended evidentiary laws that would allow for the admissibility of an alleged victim's prior sexual history at trial,[92] the Code's continued recognition of the promiscuity defense reflects a mindset that could impact Black girls who have experienced statutory rape.

Even in jurisdictions where the mistake of age and promiscuity defenses are unavailable to defendants, the attitudes underpinning these defenses are at play when the public assesses statutory rape allegations. In an opinion piece concerning the statutory rape, sexual assault, and child pornography allegations against R. Kelly, Tressie McMillan Cottom writes that some have described one of Kelly's alleged victims, a fourteen-year-old girl, as "almost ready" because of her physical development.[93] Cottom notes that this type of comment is one she has heard many times, from both men and women, as a justification for the sexual exploitation of Black girls: "If one is 'ready' for what a man wants from her, then by merely existing she has consented to his treatment of her. Puberty becomes permission."[94] Others have described Kelly's fourteen-year-old alleged victim as "fast," noting that she appeared to engage in consensual sexual activity with a man who looked like Kelly in an infamous sex tape that circulated throughout the Black community.[95]

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

---

[90] Model Penal Code § 213.6(3) (Am. L. Inst., 1980).

[91] *Id.* at § 213.6(3), cmt. 4, at 420.

[92] *See* Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 Ind. L.J. 505, 522 (2012) ("In their recently drafted codes, few states have followed the MPC in supplying the [promiscuity] defense. And with the 1998 repeal of Mississippi's requirement that a victim be chaste as an element of statutory rape, perhaps no state recognizes chastity of the victim as an element or promiscuity of the victim as a defense."); *see also* note 149, *infra* (describing the widespread adoption of rape shield laws).

[93] Tressie Mcmillan Cottom, Opinion, *How We Make Black Girls Grow up Too Fast*, N. Y. Times (July 29, 2017), https://www.nytimes.com/2017/07/29/opinion/sunday/how-we-make-black-girls-grow-up-too-fast.html [https://perma.cc/XV7R-NE37] .

[94] *Id.*

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

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

## II. The Stereotypic Connection Between Blackness and Dishonesty

In addition to advancing a set of perceptions about Black sexuality that justified sexual violence against slaves, White society promoted stereotypes regarding the inherent dishonesty of Black people. Stereotypes concerning the dishonesty of Black people were linked to perceptions about their intelligence, or lack thereof, as well as perceptions about their innate immorality.[96] For Black girls and women, beliefs about their inherent promiscuity also supported the stereotype that they were liars. These perceptions resulted in laws that prohibited Black people from testifying against Whites in court.[97] Following the abolition of slavery, Blacks gained the capacity to testify against Whites, but the law explicitly connected a given witness's credibility with her race, and, in sexual assault cases, the witness's past sexual conduct.[98] Today, stereotypes of Black girls as liars and gold diggers persist, with factors such as the race of the accused impacting the credibility of sexual assault accusers, particularly within the Black community.[99] This Section will discuss historical beliefs concerning the link between race and credibility. It will also address the impact that an accuser's race has on modern-day assessments of truthfulness.

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

Slavery-era laws generally prohibited enslaved persons from testifying against Whites.[100] For example, under a 1717 Maryland law, slaves could testify against Blacks or Native Americans but had no capacity to testify

---

[96] *See* Section II.A., *infra*. *See also* Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1, 42 (2000) (stating that the credibility of Black witnesses can be affected by the stereotype that Blacks are less intelligent than Whites and that this stereotype would be invoked where a Black witness is asked to recall and describe events accurately).

[97] *See* Section II.A., *infra*.

[98] *See* Section II.B., *infra*.

[99] *See* Section II.C., *infra*.

[100] *See* Fisher, *supra* note 35, at 1052. According to Fisher, free Blacks and free individuals of mixed race were also prohibited from testifying against Whites, but slaves, free Blacks, and free individuals of mixed race could testify against each other. *Id.* at 1052 n.11.

against White Christians.[101] Whites offered a variety of justifications for the prohibition, which was common in the southern states.[102] Some argued that individuals in menial or degraded societal positions could not credibly take an oath to tell the truth.[103] Others claimed that slaves were incapable of appreciating the obligation to tell the truth because they were not Christians[104] and that truthfulness, which is a mark of honor, could not be expected of a slave who was "permanently, ineradicably dishonored."[105] Eventually courts allowed Blacks to testify against other Blacks and Native Americans so that enslaved persons would have the capacity to provide evidence regarding planned slave rebellions.[106] Importantly, even in states where slavery never existed, like California, Indiana, Iowa, and Ohio, Blacks could not serve as witnesses in any case in which a White person was a party.[107]

Laws prohibiting Blacks from testifying against Whites impacted Black girls and women who were sexually assaulted by Whites. As discussed in Section I, slavery-era laws generally failed to criminalize the rape of Black girls and women;[108] however, in some instances, slave owners had standing to pursue criminal and civil penalties against the individuals who had sexually assaulted their slaves.[109] Slave owners had difficulty winning these cases, in part because of laws prohibiting Blacks from testifying against Whites. Unless the slave owner or another White person had witnessed the assault, slave owners could offer no admissible evidence that the incident had actually happened.[110]

---

[101] *See* Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, *in* SLAVERY & THE LAW 209, 210 (Paul Finkelman ed., 1996).

[102] *Id.*; *see also* Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 473 (1966) (stating that the rule prohibiting Blacks from testifying against Whites was well established in the slave states).

[103] Morris, *supra* note 101, at 211.

[104] *See* United States v. Dow, 25 F. Cas. 901, 904 (C.C.D. Md. 1840) (stating that the "barbarous and brutal ignorance" of slaves as well as their "crude and monstrous superstitions" made them "incapable of feeling or appreciating the obligation of an oath, as felt and appreciated in a Christian community.").

[105] Fisher, *supra* note 35, at 1077.

[106] Morris, *supra* note 101, at 213. Interestingly, abolitionists criticized this exception to the prohibition, arguing that the institution of slavery itself prevented an enslaved person from providing truthful testimony, particularly when offered against another slave, because southern law allowed for the emancipation of slaves who provided meritorious services, which included giving information about crimes committed by other slaves. *Id.* at 217.

[107] Avins, *supra* note 102, at 474 (citing cases).

[108] *See* Section I.A., *supra*.

[109] *See* Bridgewater, *supra* note 27, at 116–17; *accord Minor*, 36 Miss. at 632 (suggesting that the rape of an enslaved person might constitute a trespass against the master).

[110] *See* Bridgewater, *supra* note 27, at 117 ("Even if a slave owner did consider rape of his 'property' conduct warranting damages, unless he witnessed the assault firsthand, it was doubtful that he would rely on the account of a female slave over that of a male, free or enslaved. Further, most likely, a female slave's account would not have been believed without the supporting testimony of a white person."); *see also* Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism—Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 395–96 (2013) (describing an 1849 Virginia law that prevented Black people

Undoubtedly, perceptions concerning the credibility of Black girls and women supported these slavery-era laws. While society has traditionally stereotyped women of all races as liars when they allege rape,[111] Yarbrough and Bennett argue that a hierarchy of credibility existed during slavery and persists today.[112] They assert that men are considered more credible than women and that White women are considered more credible than Black women.[113]

Yarbrough and Bennett attribute Black women's position in the hierarchy to the pervasiveness of historical stereotypes.[114] These stereotypes concern the sexuality of Black women, as well as their truthfulness, and often connect sexual promiscuity to the tendency to lie.[115] The slavery-era stereotype of the Jezebel not only casts Black girls and women as hypersexual and unrapeable,[116] but also as inherently dishonest because they are so unchaste.[117] Another slavery-era stereotype that impacts the credibility of Black girls and women is the Mammy, described as "everyone's favorite aunt or grandmother, sometimes referred to as 'Aunt Jemima,' [who] is ready to soothe everyone's hurt, envelop them in her always ample bosom, and wipe away their tears."[118] It is the Mammy's description as "asexual," "obese," and "of dark complexion, with extremely large breasts and buttocks" that negatively affects the credibility of Black girls and women who display the physical characteristics of the stereotype.[119] Yarbrough and Bennett argue that by advancing the stereotype, male slave owners were able to disavow any sexual interest in Black women and convincingly deny their allegations

---

from testifying against a White defendant and noting that this law prohibited a Black female victim from testifying about crimes committed against her by Whites).

[111] *See* Yarbrough & Bennett, *supra* note 34, at 629–30 (arguing that the historical stereotype of women as liars, "the subject of 'scientific' as well as popular literature," impacts women's credibility when they allege sexual violence or harassment); Taylor, *supra* note 10, at 75 ("Legal commentators for at least the past three centuries have written about women's tendency to lie about being raped."). Taylor notes that Wigmore, author of one of the most influential treatises on the law of evidence, argued that every woman who alleges rape should undergo an examination of her "'social history and mental makeup'" because of the "'sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny.'" *Id.* at 76–78 (quoting 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 737, 740 (Chadbourn rev. ed. 1970)).

[112] Yarbrough & Bennett, *supra* note 34, at 634.

[113] *Id.* While Yarbrough and Bennett do not address the position of Black men in the hierarchy, America's history of lynching suggests that Black men were typically deemed less credible than White women. *See* text accompanying notes 175–81, *infra*.

[114] Yarbrough & Bennett, *supra* note 34, at 638.

[115] *Id.* ("[S]exual promiscuity is imputed to [Black women] even absent specific evidence of their individual sexual histories. This imputation ensures that their credibility is doubted when any issue of sexual exploitation is involved.").

[116] *See* Section I.A., *supra*.

[117] Yarbrough & Bennett, *supra* note 34, at 638.

[118] *Id.* at 635–36. The Mammy stereotype developed in part because of the expectation that female slaves perform domestic duties for the family of their slave owner. *Id*. at 636–37.

[119] *Id*. at 637 (internal quotation marks omitted).

of sexual violence.[120] These slave owners understood that White society would have difficulty believing that a White man might sexually desire a woman or girl who fit the stereotype.[121]

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

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

The Enforcement Act of 1880, the first law Congress passed to enforce the Fourteenth Amendment, extended to all persons the right to testify.[122] While southern states like Kentucky were slow to comply with the law,[123] by the end of Reconstruction, "the right to be a witness, theretofore denied, was deemed to be conceded."[124] Despite this change, the justice system continued in its failure to protect Black rape victims. Wriggins notes that juries rarely heard cases involving the alleged rape of a Black woman or girl and that when these cases went to trial, discriminatory procedural rules created greater protections for defendants, both Black and White.[125] Thus, while the process of pursuing a rape complaint was difficult for victims of any race, the treatment of Black rape victims was "incalculably worse."[126]

The justice system's poor treatment of Black rape victims from the period of Reconstruction through the mid-twentieth century can find its basis in the same stereotypic assumptions concerning credibility that define the Jezebel and the Mammy. For example, judges allowed lawyers to explicitly link witnesses' credibility to their race, thereby playing upon stereotypes concerning the inherent dishonesty of Black people.[127] As a part of her research on the topic of witness credibility and race, Sheri Lynn Johnson found that attorneys in the pre-Civil Rights Era often argued to juries that Black

---

[120] *Id.*

[121] *Id.* at 639. This reasoning not only ignores the fact that White men were sexually attracted to Black girls and women who fit the physical description of the Mammy stereotype, but it also looks past the reality that slave owners sometimes raped for reasons other than sexual gratification. *See* text accompanying notes 26–31, *supra*.

[122] 16 Stat. 140 §16 (1870) ("*And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to . . . give evidence."); *see also* Avins, *supra* note 102, at 501.

[123] Avins, *supra* note 102, at 501–03.

[124] *Id.* at 503.

[125] Wriggins, *supra* note 16, at 120 (describing a procedural double-standard wherein "the fact that a defendant was Black was considered relevant only to prove intent to rape a white woman; it was not relevant to prove intent to rape a Black woman.").

[126] *Id.* at 120 n.103.

[127] *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996).

witnesses were inherently less trustworthy because of their race.[128] Wriggins describes a Black woman's 1912 account of a trial judge's response to her testimony that her employer had sexually harassed her.[129] Following the woman's testimony under oath, the judge responded, "This court will never take the word of a nigger against the word of a white man."[130] In addition to allowing explicit appeals to racial prejudice, post-Civil War courts imposed rigorous proof requirements in rape cases that were especially onerous when the victim was a Black girl or woman. These practices, taken together with the continued impact of slavery-era stereotypes, resulted in investigation and trial outcomes that were influenced by a victim's race.

1. *The Requirements of Corroboration and Chastity*

Early twentieth century courts applied two evidentiary principles to rape cases that demonstrated society's skepticism toward allegations of rape. These principles created significant obstacles for any person who sought recourse from the justice system, but they were nearly impossible to overcome for Black girls and women because of their interplay with perceptions concerning the trustworthiness of the Jezebel and the Mammy.

The first obstacle was the requirement that an alleged rape victim's testimony be corroborated by other evidence. In 1886, the New York legislature became the first to enact a law mandating corroboration for rape prosecutions in an effort to protect defendants from "'untruthful, dishonest, or vicious'" complaints.[131] Following New York's lead, other states passed laws requiring corroboration,[132] and in 1904, the Georgia Supreme Court became the first court to impose the requirement in *Davis v. State*.[133] The court asserted, erroneously,[134] that the corroboration requirement had been a part of

---

[128] *Id.*; *see also* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1260 (2019) ("[F]or much of the twentieth century attorneys frequently argued that juries should discount or ignore the testimony of Black witnesses.").

[129] *See* Wriggins, *supra* note 16, at 120 n.104.

[130] *Id.* (quoting *More Slavery at the South*, 72 THE INDEPENDENT, Jan. 25, 1912, at 197–200, *reprinted in* G. LERNER, BLACK WOMEN IN WHITE AMERICA 155, 155–56 (1972)).

[131] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 957 (2004) (quoting People v. Yannucci, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939), *rev'd*, 29 N.E.2d 185 (N.Y. 1940)).

[132] *See* Anderson, *supra* note 131, at 957.

[133] 48 S.E. 180 (Ga. 1904).

[134] Anderson, *supra* note 131, at 957 (stating that the *Davis* court's reference to Lord Hale was contrary to the historical record); *accord* JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 2061 at 342 (3d ed., 1940) ("[A]t common law, the testimony of the prosecutrix or injured person, in the trial of all offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary.").

English common law and that it was still necessary due to the unique nature of rape:

> The law is well established, since the time of Lord Hale, that a man should not be convicted of rape on the testimony of the woman alone, unless there are some con current [sic] circumstances which tend to corroborate her evidence. . . . This rule appears to us to be a sound one. Without it, every man is in danger of being prosecuted and convicted on the testimony of a base woman, in whose testimony there is no truth. Of course, every woman, when she makes up her mind to prosecute for this offense, will testify that the sexual act was accomplished by force and without her consent. The man is powerless.[135]

Michelle Anderson notes that by the early 1970s, seven states had adopted corroboration requirements in all rape cases while eight states, either through statutory or case law, had expressed a preference for corroboration.[136] Another six states imposed corroboration requirements when certain facts were present, such as a delay in the timing of the complaint, and ten jurisdictions required corroboration where the alleged victim's testimony on its own was insufficient or improbable.[137] Moreover, the Model Penal Code's section on sexual offenses, originally published in 1962, states that "[n]o person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim."[138]

The corroboration requirement had a devastating impact on the reporting and successful prosecution of rape cases. For example, Lisa Crooms explains that although Washington, D.C., experienced an increase in reported rapes and rape arrests in the late 1960s and early 1970s, fewer than 50% of reported rapes were prosecuted.[139] A Washington, D.C. City Council task force empaneled to examine the state of rape law in the District found that rape was a significantly underreported crime.[140] The task force determined that the District's corroboration requirement likely had an impact on the nonprosecution rate because law enforcement officials viewed uncorroborated

---

[135] *Davis*, 48 S.E. at 181–82.

[136] Anderson, *supra* note 131, at 958 n.66.

[137] *Id.*

[138] Model Penal Code § 213.6(5) (Am. L. Inst., 1980). The provision indicates that corroborative evidence may be circumstantial. It also states that juries in sexual offense cases "shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." *Id.*

[139] *See* Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 How. L.J. 459, 490 (1997).

[140] *Id.*

rape claims as lacking credibility.[141] The task force also noted the presence of race-based and sex-based bias among prosecutors: "With prosecutorial staffs running heavily all white and male, attitudinal problems have undermined the prosecutor's ability to judge evenly and develop rapport with victims—especially with Black victims."[142] While Washington, D.C., like other jurisdictions, would go on to abrogate the corroboration requirement,[143] the perceptions that supported the rule continue to persist, especially for Black female rape victims, who must shoulder an inherent credibility problem because of their race and sex.

The second obstacle that the justice system imposed on alleged rape victims was the practice of linking a complainant's credibility to her chastity. John Henry Wigmore, author of one of the most influential treatises on the law of evidence, argued that the chastity of an alleged rape victim was directly connected to her veracity.[144] Wigmore's opinion was common in the late Nineteenth and early Twentieth centuries, with many courts advancing the narrative that "[a] woman's propensity for falsehood . . . increase[d] proportionately to her sexual experience."[145] Black girls and women, who were perceived as naturally unchaste,[146] were also perceived as naturally untruthful.[147] As Wriggins explains, "[C]hastity could not be possessed by Black women. Thus, Black women's rape charges were automatically discounted, and the issue of chastity was contested only in cases where the rape

---

[141] *Id.* at 490–91. The task force also noted that bias based on sex and race, described as a "stumbling block toward effective interaction between the prosecutor's office and the complainant," had an impact on the non-prosecution rate. *Id.* at 491.

[142] Crooms, *supra* note 139, at 491 (quoting MEMORANDUM ON REPORT OF THE PUBLIC SAFETY COMMITTEE TASK FORCE ON RAPE TO THE D.C. CITY COUNCIL 5 (Dec. 16, 1974)).

[143] *See* Arnold v. U.S., 358 A.2d 335, 344 (D.C. 1976) ("We reject, therefore, the notion given currency so long in this jurisdiction, that the victim of rape and other sex related offenses is so presumptively lacking in credence that corroboration of her testimony is required to withstand a motion for a judgment of acquittal."); *see also* Anderson, *supra* note 131, at 968 ("[T]he corroboration requirement has also been almost eradicated from formal rape law.").

[144] JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. ed., 1970).

[145] Wriggins, *supra* note 16, at 126; *see also* State v. Apley, 141 N.W. 740, 746 (N.D. 1913) ("The proof offered by cross-examination of prosecutrix, as to the prosecutrix a year previously having been an inmate of a house of prostitution, should have been received. It bore upon her general credibility."); Seals v. State, 40 S.E. 731, 732 (Ga. 1902) (holding that a woman's bad character for chastity is probative of her credibility as well as the issue of consent). *But see* People v. Gray, 96 N.E. 268, 273 (Ill. 1911) ("If the reputation of the prosecuting witness for chastity were to be held admissible as going to her general credibility, then logically such testimony would be equally admissible as to the credibility of any female who might be called to give evidence in any case. The [lower] court properly excluded the evidence as to the reputation of the prosecuting witness for chastity."); State v. Hobgood, 15 So. 406, 407 (La. 1894) (same).

[146] *See* text accompanying notes 52–53, *supra*.

[147] *See* Wriggins, *supra* note 16, at 126.

complainant was a white woman."[148] A woman's chastity, or lack thereof, was admissible evidence of her credibility in many jurisdictions until the enactment of rape shield laws, which began in the 1970s.[149] These laws generally exclude evidence of an alleged sexual misconduct victim's past sexual behavior or sexual predisposition.[150]

2. *Research on the Treatment of Black Rape Accusers*

By the 1970s, researchers had begun to study whether the justice system was providing disparate protection to rape victims based on their race, with some concluding that police officers and juries showed significant bias when assessing rape allegations made by Black women.[151] A 1979 study of nearly 1,400 rape reports in the city of Philadelphia found that "[c]ases involving black victims tend to be investigated somewhat less thoroughly than cases involving white victims."[152] Similarly, a 1968 study found that law enforcement authorities brought rape charges less frequently when the victim was Black and that the disparity was based primarily on "a lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity."[153] Gary LaFree, whose research in the 1980s focused on conviction and sentencing disparities in sexual assault cases based on victim-offender racial composition, found that "black offender-white victim rapes resulted in substantially more serious penalties than other rapes" while "black intraracial assaults consistently resulted in the least serious punishment for offenders."[154] Thus, Black men received significantly lighter pun-

---

[148] *Id*. at 126–27; *see also* Taylor, *supra* note 10, at 103 ("Viewed by the white police as 'loose women' or 'whores,' black women's reports of rape have lacked legitimacy; they have not been cognizable victims.").

[149] *See* FED. R. EVID. 412. The federal rape shield law became effective in 1978. Today, every state has enacted some form of the rape shield law. *See* Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1377 (2005).

[150] *See* FED. R. EVID. 412. The rule excludes evidence of an alleged victim's sexual history or sexual predisposition "whether offered as substantive evidence or for impeachment." *Id*. The rape shield law has been viewed by some as a law that reinforces traditional gender stereotypes. *See* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 842–43 (2013) ("Instead of subverting the chastity requirement, rape shield laws buy into them, allowing, in theory at least, any complainant in a rape trial to wipe her sexual history clean, to become a good girl again, to be brought back into the fold, and thus receive the protection of the law.").

[151] *See* Cynthia Willis Esqueda, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 SEX ROLES 213, 215 (1992).

[152] Taylor, *supra* note 10, at 103 (quoting THOMAS W. MCCAHILL ET AL., THE AFTERMATH OF RAPE 239 (1979)).

[153] *Id.* at 102 n.215 (citing Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 304 (1968)).

[154] GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 140, 145 (1989).

ishments when their victim was Black even though Black women were two-and-one-half times more likely to be raped than White women.[155]

In a related study of jury verdicts, LaFree found that jurors were less likely to believe rape allegations when the victim was Black.[156] He determined that stereotypes of Black women affected trial outcomes, with many White, middle-class jurors believing that Black women were more likely to consent to sex and less harmed by sexual assault because of their sexual experience.[157] LaFree noted that in one case involving the rape of a young Black girl, one juror believed the defendant should be acquitted "on the grounds that a girl her age from 'that kind of neighborhood' probably wasn't a virgin anyway."[158] Finally, LaFree concluded that some jurors found Black complainants to be less credible, with one White juror stating that "Negroes have a way of not telling the truth."[159] As scholars turned their research focus to date or acquaintance rape, the most common form of rape,[160] they determined that Black women who had been in a dating relationship with their alleged assailant were perceived as less credible and more responsible for their assaults when compared to their White counterparts.[161]

These studies demonstrate that slavery-era stereotypes concerning the credibility of Black girls persisted throughout the twentieth century. Next, I will explore whether perceptions concerning the inherent untruthfulness of the Jezebel and Mammy affect Black girls and women today.

### *C. Blackness as a Modern-day Proxy for Credibility*

While a number of reforms in the late twentieth century resulted in the abrogation of the corroboration requirement and the enactment of rape shield laws that generally prohibited juries from using an alleged victim's sexual history to assess her credibility, Black rape victims continue to feel the impact of the Jezebel and Mammy stereotypes. Society tends to judge Black rape survivors as less credible, and they "receive less empathy, consideration, and judicial support than their White counterparts."[162] In fact, research

---

[155] Taylor, *supra* note 10, at 104 n.226 (citing CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 217 (1980)); *see also* Wriggins, *supra* note 16, at 122 ("The thorough denial of Black women's experiences of rape by the legal system is especially shocking in light of the fact that Black women are much more likely to be victims of rape than are white women.").

[156] LAFREE, *supra* note 154, at 219.

[157] *Id.* at 220.

[158] *Id.*

[159] *Id.*

[160] *See* Willis Esqueda, *supra* note 151, at 214 (stating that a majority of rape incidents involve acquaintances rather than strangers); *see also Get Statistics*, NATIONAL SEXUAL VIOLENCE RESEARCH CENTER, https://www.nsvrc.org/node/4737 [https://perma.cc/446J-3BUX ] (last visited Jan. 11, 2020) (stating that the victim knew the perpetrator in more than five out of ten cases of sexual assault).

[161] Willis Esqueda, *supra* note 151, at 224; Donovan & Williams, *supra* note 63, at 97.

[162] Donovan & Williams, *supra* note 63, at 97.

in this area suggests that the belief that Black rape victims lack credibility persists in both White and Black communities.[163]

Modern-day stereotypes of Black girls also impact their credibility. Researchers have found that the Sapphire stereotype, popularized by a character in the 1950s television show *Amos and Andy*, influences societal perceptions of Black girls.[164] The Sapphire is described as "evil, bitchy, stubborn[,] and hateful," and her skin color is usually brown or dark brown.[165] The Sapphire is loud, aggressive, emasculating, angry, and unfeminine.[166] This stereotype tracks with modern-day perceptions of Black girls, who are often viewed as loud, aggressive, and dominating.[167] Because the Sapphire also has a reputation for being deceitful, disloyal, and dishonest, Black girls who display the characteristics of the stereotype may be perceived as less credible.[168] Another contemporary stereotype that likely impacts the credibility of Black girls is the Gold Digger, described as a girl or woman who "will sell, rent, or trade her body or sexuality for hard currency; basic needs such as groceries; or consumer items, including manicures, new clothes, or vacations."[169] The stereotypical Gold Digger views her relationships as financial arrangements, and once the money runs out, she will turn on her man.[170] Indeed, in reaction to the sexual violence and exploitation claims made against R. Kelly in the early 2000s, many members of the public argued that his accusers could not be believed because they were just Gold Diggers seeking a payout.[171]

While both slavery-era and modern-day stereotypes impact the believability of Black girls and women who make accusations of sexual assault or rape, another factor appears to have a strong effect on the Black community's reaction when a Black girl or woman accuses a Black man of rape.

---

[163] Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA. WOMEN'S L.J. 27, 40 (1996) (citing research).

[164] *See* Yarbrough & Bennett, *supra* note 34, at 639.

[165] *Id.* at 638.

[166] EPSTEIN, *supra* note 69, at 5 (stating that the Mammy, Jezebel, and Sapphire stereotypes "have persisted into present day culture, which 'paint Black females as hypersexual, boisterous, aggressive, and unscrupulous'" (internal citation omitted)).

[167] *See id.*

[168] *See* Yarbrough & Bennett, *supra* note 34, at 639.

[169] West, *supra* note 64, at 91.

[170] *Id.*

[171] *See, e.g.*, Gina Tron, *Who Are Sisters Lindsey Perryman-Dunn And Jen Emrich, Who Defend R. Kelly In Part II Of 'Surviving R. Kelly'?,* OXYGEN (Jan. 3, 2020, 3:24 PM), https://www.oxygen.com/true-crime-buzz/surviving-r-kelly-who-are-sisters-lindsey-perryman-dunn-and-jen-emrich [https://perma.cc/2KR6-DJRS] (noting that R. Kelly's accusers have been characterized as desperate for money and fame and quoting one defender of R. Kelly, who stated, "A lot of these women figured out if they say R. Kelly hurt them, they'll get a book deal, they'll get famous."); Prachi Gupta, *Reporter Who Broke R. Kelly Sex Abuse Allegations: "Nobody Matters Less to Our Society Than Young Black Women,"* SALON (Dec. 17, 2013, 10:30 PM), https://www.salon.com/2013/12/16/reporter_who_broke_r_kelly_sex_abuse_allegations_nobody_matters_less_to_our_society_than_young_black_women/ [https://perma.cc/2UPJ-YNSP] (stating that R. Kelly's accusers were described as "bitches, hos, and gold diggers").

When asked about his decision to make music with R. Kelly despite the numerous allegations of sexual abuse that had been made against Kelly, recording artist Chance the Rapper acknowledged that working with the singer was a mistake.[172] He stated that when he made the decision to collaborate with Kelly, he viewed him as a victim.[173] He added: "We're programmed to really be hypersensitive to black male oppression."[174]

Chance's response suggests that the criminal justice system's history of racism against Black men impacts the believability of Black girls and women who accuse Black men of rape. The United States' history of racism is typified by the prevalence of lynching in the late Nineteenth and early Twentieth Centuries.[175] Between 1882 and 1946, approximately 5,000 people were lynched in the United States, and about 75% of lynching victims were Black.[176] Many lynch mobs targeted Black men based on oftentimes false allegations that they had raped White women.[177] N. Jeremi Duru notes that lynchings occurred across the country, in both the north and the south, and were "spectacles often attended by large groups, sometimes thousands, many of whom enjoyed and took pride in the murders."[178]

The fear of lynching created terror in the Black community as accounts spread of White lynch mobs torturing, dismembering, and burning their victims alive.[179] In fact, the Black community understood that Black men were particularly vulnerable to lynching based on false allegations of rape "by white women who had engaged in consensual sex with former slaves but

---

[172] Daniel Kreps, *Chance the Rapper: 'Making a Song with R. Kelly Was a Mistake,'* RollingStone (Jan. 5, 2019. 3:56 PM), https://www.rollingstone.com/music/music-news/chance-the-rapper-r-kelly-mistake-775431/ [https://perma.cc/628M-GNH4].

[173] *Id*.

[174] *Id*. (internal quotations omitted). Chance also stated, "Usually, niggas that get in trouble for shit like this on their magnitude of celebrity, it's light-skinned women or white women. That's when it's a big story. I've never really seen any pictures of R. Kelly's accusers." *Id.* Chance's response suggests that a White or light-skinned Black woman would be more credible than a dark-skinned Black woman. Chance's statement is an example of colorism, a term coined by Pulitzer Prize-winning author Alice Walker that can be defined as "prejudicial or preferential treatment of same-race people based solely on their color." Kimberly Jade Norwood & Violeta Solonova Foreman, *The Ubiquitousness of Colorism: Then and Now*, *in* Color Matters: Skin Tone Bias and the Myth of a Post-Racial America 9, 9 (Kimberly Jade Norwood ed., 2014). Chance implies that a dark-skinned woman might need to do more to convince police officers, prosecutors, and jurors that she was assaulted. In essence, she would be forced to overcome society's assumption that she is not attractive enough to be raped. *Accord* text accompanying notes 120-21 (stating that slave owners were able to convincingly deny allegations of rape made by Black girls and women who fit the Mammy stereotype by asserting a lack of physical attraction).

[175] Lynching is defined as a "killing done by several people acting in concert outside the legal process to punish a person perceived to have violated a law or custom." Randall Kennedy, Race, Crime, and the Law 42 (1997).

[176] *See* Wriggins, *supra* note 16, at 107.

[177] *See* note 49, *supra*.

[178] N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man,* 25 Cardozo L. Rev. 1315, 1326 (2004).

[179] *See* Wriggins, *supra* note 16, at 107–08.

later found it expedient to deny it."[180] High-profile proceedings such as the Scottsboro Cases were examples of "legal lynching" wherein false allegations of rape by White women resulted in Black men and boys serving many years in prison and sometimes being executed.[181]

One less apparent consequence of the country's mistreatment of Black men accused of rape was a reluctance on the part of Black women to report their own rapes. Describing the terror that existed in Black communities during the lynching years, Broussard notes that crimes such as rape, incest, domestic violence, and other offenses were underreported because Black women did not want to bring attention to Black men.[182] Black women's reluctance to subject Black men to the racism of the American justice system continues to impact the reporting of rape today, and many in the Black community have come to expect and often demand that Black women preserve the image of the race by remaining silent.[183] According to Broussard, Black women have been taught that they are first Black, then women.[184]

When a Black girl or woman reports that a Black man has raped her, she faces disbelief and skepticism from the larger society but also from members of her own community. Gill argues that many in the Black community view any Black man accused of rape as the victim and the Black accuser as someone who is helping to perpetuate the stereotype that all Black men are rapists.[185] She asserts that Black women who accuse Black men of rape "lose their place in the Black 'family' because of the conflict in the Black community caused by the intersection between gender and race."[186]

Crenshaw, who coined the term "intersectionality" to describe the unique form of discrimination Black women face when sexism and racism collide,[187] has found that the Black community disregards and vilifies Black women who accuse Black men of rape because their accusations are viewed

---

[180] Cardyn, *supra* note 44, at 699.

[181] *See* Wriggins, *supra* note 16, at 109–10 (defining legal lynching as the legal system's mistreatment of Black men accused of raping White women and describing the Scottsboro cases of the 1930s); *id.* at 112-13 ("Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed. In stark contrast, only two percent of all defendants convicted of rape involving other racial combinations were executed.").

[182] *See* Broussard, *supra* note 110, at 407.

[183] *See id.* at 409 (stating that Black women remain silent about the sexual violence they have experienced not just out of shame, "but [also] out of a need to preserve the race and its image. In our attempts to preserve racial pride, we [B]lack women have sacrificed our own souls" (quoting Charlotte Pierce-Baker, Surviving the Silence: Black Women's Stories of Rape 84 (1998)); Gill, *supra* note 163, at 43 ("Not surprisingly, the fear of not being believed, of racism against her, and of exposing a Black man to a racist criminal justice system may cause a Black rape victim not to report an incident of rape by a Black man.").

[184] Broussard, *supra* note 110, at 412.

[185] *See* Gill, *supra* note 163, at 43.

[186] *Id.*

[187] See Crenshaw, *supra* note 68, at 1244 ("[M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood . . . . [T]he intersection of racism and sex-

as racist attacks against Black men.[188] She provides the 1992 Mike Tyson rape trial as an example.[189] Tyson was tried and convicted of raping an eighteen-year-old Black woman named Desiree Washington.[190] Crenshaw notes that Tyson and his supporters advanced his claim of innocence by pushing for solidarity within the Black community.[191] In fact, some commentators directly compared Tyson to Black men who were lynched based on false allegations that they had raped White women.[192] Similarly, in response to allegations of sexual violence and exploitation against R. Kelly that resulted in formation of the #MuteRKelly movement, the singer's management team released a statement that directly invoked the country's history of lynching: "Since America was born, black men and women have been lynched for having sex or for being accused of it. We will vigorously resist this attempted public lynching of a black man who has made extraordinary contributions to our culture."[193] United States Supreme Court Justice Clarence Thomas and actor and comedian Bill Cosby have also described themselves as lynching victims in response to allegations of sexual violence and harassment.[194]

---

ism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.").

[188] *Id.* at 1273; *accord* Crooms, *supra* note 139, at 483 ("Some commentators deftly cast Black women as villains who actively participate in the victimization of Black men. In particular, they denounce Black women who dare to problematize gender in the politics of Black liberation by speaking about issues such as intraracial sexual violence against Black women."). Even Black female journalists who report on sexual violence allegations against Black men face a great deal of scrutiny from some members of the Black community. *See, e.g.,* Brooklyn Baldwin, *50 Cent Doubles Down On Criticism of Oprah Winfrey's Upcoming Russell Simmons Sexual Abuse Documentary*, THE ROOT (Dec. 14, 2019, 9:37 AM), https://www.theroot.com/50-cent-doubles-down-on-oprah-winfreys-upcoming-russell-1840430906?rev=1576336900791&utm_source=theroot_facebook&utm_medium=socialflow [https://perma.cc/7VD3-H2TT] (noting rapper 50 Cent's public criticism of Oprah Winfrey and Gayle King for publicizing Black women's rape allegations against Russell Simmons and R. Kelly, including his statement: " 'I just want to know why [Winfrey] is only going after her own. When it's clear the penalties have been far more extreme for African American men.' ").

[189] *See* Crenshaw, *supra* note 68, at 1273-74.

[190] *See* Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 999 (1992).

[191] *See* Crenshaw, *supra* note 68, at 1273.

[192] *See* Crooms, *supra* note 139, at 488. Crooms describes a major flaw in this comparison—namely, that Tyson was accused of intraracial rape. She asserts that Tyson supporters who attempted to compare him to lynching victims failed to consider the fundamental question of whether a Black man had ever been lynched for allegedly raping a Black woman. *Id.* at 488–89.

[193] Laura Snapes, *R Kelly: Time's Up Campaign Against Me is 'Attempted Lynching of a Black Man,'* THE GUARDIAN (May 1, 2018, 6:36 PM), https://www.theguardian.com/music/2018/may/01/r-kelly-times-up-muterkelly [https://perma.cc/23DP-TUKV].

[194] *See* Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings,* N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html [https://perma.cc/SEV3-TH4G]; Kristen de Groot & Claudia Lauer, *Cosby Confined to His Home as Team Decries 'Public Lynching,'* WASH. POST (April 27, 2018, 5:05 PM), https://www.washingtonpost.com/na-

This strategic use of lynching imagery has an obvious impact on the credibility of Black girls and women who accuse Black men of sexual violence. Some members of the Black community view these girls and women as bad actors who want to bring down their own men.[195] Indeed, for some in the Black community, it is preferable for Black girls and women to remain silent about their legitimate claims of rape rather than subject a Black man to a racist criminal justice system. Describing the Black community's response to the Tyson rape trial, Kevin Brown notes that many believed Tyson's conviction was symbolic of the justice system's unfair treatment of Black men. Thus, "[t]o support Tyson, then, is to fight against racial domination of African[ ]Americans."[196] Brown also describes a belief held by some in the Black community that the fight against racial subordination is more important than the fight against the sexual subordination of Black girls and women.[197] He describes the hierarchy in the following way:

> Although it is true that a Sister had been raped by a Brother, Tyson was now a victim of racism in the criminal justice system. Despite the fact that Brothers certainly want to support Sisters, concerns about the Sisters must wait until after we have dealt with the Man (resolved the racial issue). Let us not forget, we have been trying to resolve the racial issue for over 370 years.[198]

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

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

## III. The Impact of Race-Based Stereotypes on the Players in the Justice System

Given the prevalence of societal perceptions concerning the promiscuity and dishonesty of Black girls, it is necessary to consider whether these perceptions have permeated the justice system. As noted earlier, studies conducted in the 1960s and 1970s determined that law enforcement authorities

---

tional/bill-cosby-americas-dad-convicted-of-drugging-sex-assault/2018/04/27/b898fd58-49d4-11e8-8082-105a446d19b8_story.html [https://perma.cc/GR8F-N3X4].

[195] *See* text accompanying notes 185–86, *supra*.

[196] Brown, *supra* note 190, at 1002.

[197] *Id*.

[198] *Id.*

were less likely to investigate and file charges in rape cases involving Black victims based on perceptions that they were more promiscuous and less truthful compared to White victims.[199] Similarly, research conducted in the 1980s found that jurors were less likely to believe Black rape accusers based on perceptions about their hypersexuality and tendency to lie.[200] More recent research suggests that, despite a number of rape reform efforts that have reduced barriers to obtaining a rape conviction, Black women continue to experience discrimination when they seek recourse from the justice system.[201] Moreover, as a result of society's tendency to make Black girlhood interchangeable with Black womanhood,[202] Black girls also experience this discrimination.

A significant body of research concerning the justice system's perceptions of rape victims has focused on the system's tendency to rely on rape myths. Morrison Torrey places the "classic" yet debunked rape myths into the following four categories: "(1) only women with 'bad' reputations are raped; (2) women are prone to sexual fantasies; (3) women precipitate rape by their appearance and behavior; and—by far the most potent myth—(4) women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sexual relations."[203] Importantly, many of these myths track with slavery-era stereotypes that Black girls and women are inherently promiscuous and therefore have bad reputations; cannot be raped or are not significantly affected by rape, perhaps because they are prone to sexual fantasies; and have a tendency to falsely claim rape, perhaps because they are vengeful gold diggers seeking money. If it is true that police officers, judges, jurors, defense attorneys, and prosecutors rely on rape myths when assessing allegations of rape, then Black girls begin their journey through the justice system in a much worse position than their White counterparts.

---

[199] *See* text accompanying notes 151–53, *supra*.

[200] *See* text accompanying notes 156–59, *supra*.

[201] *See* Pokorak, *supra* note 15, at 35–36 (stating that while reform efforts have increased the likelihood that rape victims will receive equal treatment, "Black rape victims still suffer from discrimination merely because they are not White.").

[202] *See* Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 68 (2017) (citing EPSTEIN, *supra* note 69, at 4).

[203] Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991); *see also* Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH. L. REV. 219, 230–31 (2016) (noting that rape myths also include the belief that women invite rape when they consume alcohol, that a genuine assault would be reported to police immediately, and that a real rape victim would fight back and therefore sustain some injury during the assault). Torrey argues that included within these four categories are a number of untrue beliefs and perceptions about rape, including the belief that women mean "yes" when they say "no," that women are "asking for it" when they wear certain clothing, that women derive pleasure from being raped, that most women who are raped are promiscuous, that a woman who goes home with a man is consenting to sex, and that women sometimes "cry rape" to cover up an illegitimate pregnancy or to get revenge. Torrey, *supra* note 203, at 1015.

Several studies confirm that the players in the justice system rely on rape myths, including stereotypes based on race, and that, when they do, rape victims experience unfair treatment. Part A will discuss research demonstrating that police officers, judges, defense attorneys, and jurors accept certain disproven stereotypes and perceptions about rape victims. I have reserved Part B for a discussion of the most powerful player in the justice system: the prosecutor.[204] Prosecutors' power lies in their nearly unchecked discretion to file charges.[205] Thus, prosecutors who buy into societal stereotypes concerning Black girls can immediately cut off a victim's access to justice and allow a rapist to walk free.

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

Like other members of society, police officers often assess rape allegations using rape myths that include race-based stereotypes about rape victims. In a 2017 study that sought to determine how often traditional rape myths appeared in the official police records of sexual assault investigations, researchers found that "police routinely invoke rape myths regarding what real rape looks like, who can be raped, and who is to blame."[206] The study found that police records often included statements assessing the victim's credibility, such as comments that a victim was promiscuous or had a bad reputation.[207] Researchers determined that police officers' attitudes toward rape victims can impact their investigative practices and concluded that rape myths influence police officers on an "implicit" and "undetectable" level.[208] Similarly, a 2016 study found that adolescent sexual assault victims often perceive police officers as responding to their allegations with skepticism and victim blaming.[209] The researchers noted that these attitudes appeared to be more prevalent where police officers viewed the victim as a "bad teenager" based on behavior unrelated to the assault or victim character traits such as ethnicity.[210] The study concluded that the perceived victim-blaming

---

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

[205] *See id.*

[206] Jessica Shaw et al., *Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records*, 7 PSYCH. OF VIOL. 602, 610 (2016).

[207] *Id.*

[208] *Id.*

[209] *See* Megan R. Greeson et al., *"Nobody Deserves This": Adolescent Sexual Assault Victims' Perceptions of Disbelief and Victim Blame from Police*, 44 J. OF CMTY. PSYCH. 90, 106–07 (2016).

[210] *Id.* at 105–06.

and skepticism of police officers could result in less-thorough investigations as well as victims' refusal to cooperate with police.[211]

With regard to judges, studies dating back to the 1970s and 1980s reveal that they often adopt and reinforce rape myths.[212] In a study of judges in the city of Philadelphia, researchers found that they had a tendency to classify acquaintance rape as consensual.[213] These judges also tended to believe that women often make false rape allegations to get "even" with a man.[214] A study of Indianapolis judges found that they held stereotypical beliefs about rape victims, with one judge expressing his opinion that a girl is "asking for" rape if she is well-endowed, goes to a bar, and consumes alcohol.[215] More recent research demonstrates that judges sometimes reference rape myths in their written opinions. For example, a study of 1,332 state appellate court opinions issued in 2012 revealed that in 39% of the decisions, the court upheld or reinforced at least one rape myth.[216] Likewise, media reports suggest that some judges continue to embrace certain rape myths.[217]

Moreover, defense attorneys, who are tasked with mounting the best defense possible to a charge of rape or other crimes of sexual violence, often promote rape myths and stereotypes in an effort to impeach the credibility of alleged victims. Because rape cases typically lack physical evidence or eyewitness testimony, case outcomes often turn on the credibility of the accuser.[218] Defense attorneys put victims on trial by perpetuating racial, gender, or cultural stereotypes with an understanding that "legal and factual

---

[211] *Id.* at 106–07.

[212] *See* Torrey, *supra* note 203, at 1055–56.

[213] *Id.* at 1056.

[214] *Id.*

[215] *Id.* at 1057.

[216] Holly Boux, *"If You Wouldn't Have Been There That Night, None of This Would Have Happened to You:" Rape Myth Usage in the American Judiciary*, 40 WOMEN'S RTS. L. REP. 237, 259 (2019). Boux found that courts challenged or debunked traditional rape myths in thirty-three percent of the opinions. *Id.* She notes that the appearance of rape myths in judicial opinions is not a rare occurrence. "Instead, they are enduring frames that circle in judicial considerations and writing about sexual violence." *Id.*

[217] *See* Sophie Lewis, *Judge Permanently Removed from Bench After Telling Alleged Rape Victim to "Close Your Legs,"* CBS NEWS (May 27, 2020, 2:51 PM), https://www.cbsnews.com/news/judge-john-russo-permanently-removed-told-woman-close-your-legs-sexual-assault/ [https://perma.cc/Q6EH-C99H]; Maryclaire Dale, *2 Judges' Comments, Handling of Rape Cases Draw Criticism*, ABC NEWS (July 3, 2019, 10:50 PM), https://abcnews.go.com/US/wireStory/judges-comments-handling-rape-cases-draw-criticism-64116971 [https://perma.cc/JVK4-L889] ("Two New Jersey judges have come under fire for their handling of rape cases, one for asking whether a 16-year-old Eagle Scout 'from a good family' should face serious consequences over a video-recorded assault on an intoxicated teenager. Another judge asked whether a 12-year-old girl's loss of virginity constituted serious harm.").

[218] *See* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 653 (2001) ("In [sexual assault] cases, little physical evidence may exist to connect the suspect to the crime, and typically there will not be eyewitnesses who can corroborate the victim's testimony. The likelihood of conviction thus depends primarily on the victim's ability to articulate what happened and to convince a judge or jury that a sexual assault occurred.").

argument often persuades to the degree it piggybacks on the existing prejudices of a listener."[219] Additionally, attorneys sometimes discredit witnesses by "othering" them. "Othering" is defined as "a process by which individuals and society view and label people who are different in a way that devalues them."[220] To the extent defense attorneys can convince jurors that the rape victim is not like them, defense attorneys can impair the victim's credibility by putting distance between the jury and the rape victim.[221] At times, defense attorneys have successfully "othered" witnesses by using racial stereotypes.[222] In rape cases, counsel's subtle use of stereotypes concerning the promiscuity and dishonesty of Black rape victims might increase the likelihood of an acquittal.

Defense attorneys' assumptions about jurors' use of rape myths and stereotypes have proven to be true. As stated earlier, one of the jurors who voted to acquit R. Kelly on charges of child pornography in 2008 appeared to assess the credibility of the singer's alleged victims based on racial stereotypes and rape myths.[223] Research suggests that jurors commonly rely on rape myths and racial stereotypes. Consistent with LaFree's findings in the early 1980s that White, middle-class jurors are less likely to believe a Black rape victim's allegations due to the impact of racial stereotypes,[224] other studies conducted in the latter part of the twentieth century found that White jurors generally perceive Black crime victims to be less truthful than other victims.[225] More recent research suggests that rape myths, including perceptions about a victim's manner of dress and sexual history, influence juror decision-making.[226] Jurors who believe in rape myths will seek out stereotype-consistent information and disregard information that is inconsistent with rape myths and stereotypes.[227] Additionally, the activation of racial and

---

[219] Eva S. Nilsen, T*he Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 1 (1994).

[220] Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

[221] *See* Thompson, *supra* note 128, at 1263.

[222] *Id.* at 1264–65 (describing the othering of a Black witness by defense counsel during the *State of Florida v. George Zimmerman* trial). Attorneys who engage in blatant racism might run afoul of the rules of professional responsibility. *See* MODEL RULES OF PRO. CONDUCT R. 8.4(G) (AM. BAR ASS'N 2016) (stating that a lawyer commits professional misconduct by "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").

[223] *See* text accompanying note 5, *supra*.

[224] *See* text accompanying notes 156–59, *supra*.

[225] *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1635 (1985).

[226] *See* Lave, *supra* note 203, at 231 ("The power of rape myths is not mere conjecture; studies have shown that they impact mock jurors and prosecutors.").

[227] *See* Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1075 (2014) ("Specifically, we suggest that exposure to rape culture increases the likelihood that jurors will endorse rape myths and view women as sex objects and, in turn, attend to schema and script consistent denials and

ethnic stereotypes in jurors affects their ability to recall stereotype-inconsistent evidence.[228]

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

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

Prosecutors possess significant discretion to make charging and plea negotiation decisions and determine the range of punishment for a crime, and this discretion is nearly unreviewable.[229] The U.S. Supreme Court has defined prosecutorial discretion in the following way: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[230] Generally, prosecutors are not required to justify their charging decisions, and a court will not question a prosecutor's exercise of discretion unless some evidence exists that the prosecutor has made decisions with a discriminatory motive.[231]

While prosecutors wield significant discretion, they also face pressure to win their cases. Chief prosecutors are often elected, and even those who are not can best show their effectiveness by obtaining convictions.[232] As Tamara Rice Lave notes, a 2015 amendment to the ABA's professional standards for prosecutors states that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[233] In essence, public pressure and ethical rules require prosecutors to exercise their discretion in a manner that will ensure a conviction.

In sexual assault and rape cases, a prosecutor's focus on conviction results in what Lisa Frohmann has termed a "downstream orientation" in

---

justifications put forth by alleged perpetrators, while simultaneously ignoring contradictory evidence.").

[228] *Id.*

[229] Pokorak, *supra* note 15, at 43 (footnote omitted) ("The fate of those caught up in the criminal justice system lies in the hands of prosecutors. The prosecutor exercises near unlimited power to determine the charge, to offer plea bargains and to determine the severity of punishment. This extensive authority is exercised out of public view, without objective criteria, and is essentially not reviewable.").

[230] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[231] *See* Davis, *supra* note 204, at 38, 40 (citing cases).

[232] Lave, *supra* note 203, at 229–30.

[233] *Id.* at 226 (citing CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.3(a) (AM. BAR ASS'N 2015)).

prosecutorial decision-making.[234] Frohmann argues that prosecutors make charging decisions in anticipation of how a jury and defense attorneys will view the case.[235] Prosecutors anticipate defense arguments as well as jurors' likely view of the evidence, and if prosecutors believe that a conviction is unlikely, then they will reject the case.[236] Frohmann found that prosecutors' downstream orientation results in them rejecting rape cases where the victim was likely raped but the chance of conviction is low due to anticipated juror biases.[237]

Prosecutors' focus on convictability causes them to more closely scrutinize rape allegations that deviate from the prototypical rape, which Pokorak defines as "the kidnapping and forcible penetration of one White woman by one stranger who is a Black male."[238] He argues that any departures from the prototypical rape (e.g., the victim and assailant are not strangers, the victim is Black, or the assailant is White) make the case less prosecution-worthy.[239] To determine the likelihood of a conviction, prosecutors "create an image, not of a *typical* rape victim, but of a *genuine* rape victim."[240] They are more likely to reject cases involving victims whose characteristics and behavior differ from the image of a genuine rape victim, particularly in cases where the victim would be required to provide credible testimony.[241] Thus, prosecutors employ rape myths and stereotypes to make charging decisions even when they are not personally influenced by them.[242]

Moreover, researchers have found that victim race significantly affects prosecutors' exercise of their discretion. A 2001 study of prosecutors in Kansas City and Philadelphia found that they were four-and-one-half times more likely to file charges in stranger sexual assault cases when the victim was a White woman as compared to cases where the victim was a Black woman.[243] Researchers surmised that this disparity exists because today's prosecutors, like slavery-era courts and lawmakers, "view aggravated sexual assaults on

---

[234] *See* Lisa Frohmann, *Convictability in Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 535 (1997).

[235] *Id.*

[236] *Id.* at 536.

[237] *Id.* at 536–37.

[238] Pokorak, *supra* note 15, at 39.

[239] *Id.*; *see also* Oberman, *supra* note 81, at 752 ("Prosecutors concerned with rationing scarce criminal justice resources, as well as with securing convictions, will bring their own perceptions of consensual sex and/or their sense of a prospective juries' perceptions of 'harmful' sex, to bear in determining when and whether a [statutory rape] prosecution should take place.").

[240] Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 233 (2001) (emphasis in original).

[241] *Id.*

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

[243] Spohn & Holleran, *supra* note 218, at 680–81; *accord* Spohn et al., *supra* note 240, at 224, tbl. 3 (finding that Miami-Dade County prosecutors rejected 58.1% of sexual battery cases involving Black victims but only 31.1% involving White victims).

white women as particularly serious."[244] Along the same lines, Frohmann's study of prosecutors found that they often use class and race distinctions between victims and potential jurors to justify case rejections, believing that jurors' misinterpretations of race and class differences will result in acquittals.[245] Frohmann argues that prosecutors who take this approach "reinforce the idea that social arrangements organized around race and class are 'natural,' which in turn reifies the differences and misunderstandings."[246] This research makes clear that prosecutors serve as gatekeepers to the justice system for Black girls who experience sexual assault and rape. By allowing traditional race and gender stereotypes to affect their decisions, prosecutors carry forward and nourish a system of differential treatment that has plagued Black girls since our country's founding.

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

## IV. A Solution Centered on the Justice System

Every player in the justice system should understand the ways in which racial stereotypes and rape myths affect outcomes in sexual assault cases, but because police officers are present at the origin of any sexual assault investigation and prosecutors play the most impactful role in the system, many of the solutions proposed in this Section focus on police officers and prosecutors. Regarding the other players in the justice system, I will briefly address efforts the system can undertake to better educate them on the ill effects of stereotypic decision-making in sexual assault and rape cases involving Black girls.

### *A. Reforming the Flawed System of American Policing*

Any proposal to address police officers' reliance on rape myths and racial stereotypes must be considered in the context of the nation's broader conversation concerning policing reform. Since the death of George Floyd at the hands of Minneapolis police officer Derek Chauvin in May of 2020,[247]

---

[244] Spohn & Holleran, *supra* note 218, at 681; *see also* Section I.A., *supra* (describing slavery-era laws that defined rape as a crime only when the victim was White).

[245] *See* Frohmann, *supra* note 234, at 552.

[246] *Id.* at 553.

[247] *What We Know About the Death of George Floyd in Minneapolis,* N.Y. Times (May 27, 2020), https://www.nytimes.com/2020/05/27/us/george-floyd-minneapolis-death.html#:~:text=MR.%20Floyd%20died%20after%20being%20handcuffed%20and%20pinned,Ben%20Crump%20Law%20By%20The%20New%20York%20Times [https://perma.cc/M6QF-UN4Z].

the country's attention has turned to a decades-long movement that calls for police departments to be defunded.[248] Activists who seek the defunding of police departments are not demanding that municipalities cut all monetary support for policing. Instead, "'[d]efund the police' means reallocating or redirecting funding away from the police department to other government agencies funded by the local municipality."[249] These advocates argue that more taxpayer dollars should go toward supporting social services that can address issues like homelessness, drug addiction, and mental health.[250] The reallocation of funding from police departments to other government agencies would accompany a change in police officers' job duties. Social services agencies would respond to non-violent calls, providing police officers with more time to respond to and investigate violent crimes like rape.[251]

Other activists demand the abolition of policing as it is traditionally understood.[252] While some within this group seek the disbanding and rebuilding of police departments as well as the dissolution of police unions, others call for an end to all policing.[253] Advocates supporting the latter position argue that, through major changes in the allocation of taxpayer dollars, police departments and prisons can become obsolete.[254] They assert that community members are better-positioned to respond to calls for assistance, and they propose a restorative justice model for addressing criminal conduct.[255]

---

[248] *See* Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?,* BROOKINGS (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/BHT9-AFMB]; *see also* Maya King, *How 'Defund the Police' Went from Moonshot to Mainstream*, POLITICO.COM (June 17, 2020, 4:30 AM), https://www.politico.com/news/2020/06/17/defund-police-mainstream-324816 [https://perma.cc/AMQ6-CKVU] (stating that the movement to defund police departments has existed since the early 1990s).

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *See* Mariame Kaba, *Opinion*: *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/T76Y-GD3R].

[253] *Id.*

[254] *Id.* ("People like me who want to abolish prisons and police . . . have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation. What would the country look like if it had billions of extra dollars to spend on housing, food and education for all?").

[255] *Id.* (stating that society has become indoctrinated with the idea that policing and incarceration are the only methods of addressing violence and suggesting that municipalities utilize restorative justice as an alternative to incarceration); *see also* Laurie S. Kohn, *#MeToo, Wrongs Against Women, and Restorative Justice*, 28 KAN. J.L. & PUB. POL'Y 561, 577 (2019) (stating that restorative justice "seek[s] to address criminal wrongdoing and the harms caused by engaging not only the offender, but the victim and relevant community alike. By addressing survivors' needs and engaging offenders' capacity for rehabilitation, restorative justice practitioners seek to work outside or alongside the traditional criminal and civil justice system to achieve broader and more flexible case resolutions.").

I believe municipalities must redefine the role of law enforcement officers in American society. While I do not favor an end to all policing, I support the disbanding and reformation of police departments in an effort to overhaul the relationship between police officers and the communities they serve. From the operation of slave patrols in the south to racially biased policing by some law enforcement officers today, the relationship between policing organizations and Black people has been one based on controlling, punishing, and limiting the freedom of the Black body.[256] As Mariame Kaba notes, "when you see a police officer pressing his knee into a black man's neck until he dies, that's the logical result of policing in America. When a police officer brutalizes a black person, he is doing what he sees as his job."[257] In addition to perceiving that police officers' primary job duty is to control Black people, many believe that police officers are unwilling to protect or value Black life.[258] Politicians who pit Black Lives Matter activists and protestors against the police reinforce this message.[259]

To truly rid American policing of the systemic racism upon which it was founded, our system of policing must be rebuilt. This restructuring would include a reformation of policing policies and the redefining of police officers' job duties. Police officers would investigate and respond to calls involving violence, leaving other government agencies and community groups to provide assistance in all other circumstances. Officers and police department leaders who are currently employed would be required to reapply for their jobs,[260] and all new hires would be trained on the racist past of

---

[256] *See* Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship between African-Americans and the Police*, 85 UMKC L. Rev. 697, 714–30 (2017) (describing the similarities between modern-day policing and southern slave patrols and demonstrating that throughout the nation's history, Black people and the police have been on opposite sides during incidents of racial conflict).

[257] Kaba, *supra* note 252.

[258] *See* Thompson, *supra* note 256, at 720 ("Police officers' past failure to protect and value Black life, together with a legacy of control, subordination and racial discrimination sanctioned and enforced by law enforcement, planted the seeds of a narrative pitting African-Americans against police officers. This narrative, which suggests that law enforcement exists to control Blacks rather than protect them, has been reinforced by modern-day stories of injustice, both real and perceived, at the hands of police officers.").

[259] *See* John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges,* N.Y. Times (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html [https://perma.cc/G44P-VWGN] ("While the Black Lives Matter movement enjoyed broad approval in the weeks after George Floyd's death in Minneapolis police custody, Democrats worry that the unrest [including images of vandalism, looting and arson], regardless of its extent or who is responsible, could help President Trump find a receptive audience for his argument that he will bring 'law and order' to the country.").

[260] In recent years, police departments across the country have been disbanded and reformed due to problems of corruption and racism. *See, e.g.*, Carol D. Leonnig et al., *Darren Wilson's First Job Was on a Troubled Police Force Disbanded by Authorities*, Wash. Post (Aug. 23, 2014), https://www.washingtonpost.com/national/darren-wilsons-first-job-was-on-a-troubled-police-force-disbanded-by-authorities/2014/08/23/1ac796f0-2a45-11e4-8593-da634b334390_story.html [https://perma.cc/AZ88-6UUS] (describing the 2011 disbanding of the Jennings, Missouri Police Department).

American policing as well as the need for police officers to establish a positive presence in the communities they serve. Municipalities would make race, gender, religious diversity, and sexual orientation diversity a priority when hiring, and officers would be required to live in the cities they serve. Applicants unwilling to acknowledge that Black lives matter would be ineligible for hire.

The Camden, New Jersey Police Department, which dissolved and replaced its entire police force in 2012 due to widespread corruption within its ranks, has experienced a reduction in crime and much-improved relations with the community it serves.[261] City officials attribute the police department's success to an increase in the racial diversity of the police force, officer training on de-escalation and problem-solving over deadly force, and a commitment to community-first policing: "It starts from an officer's first day: When a new recruit joins the force, they're required to knock on the doors of homes in the neighborhood they're assigned to patrol . . . . They introduce themselves and ask neighbors what needs improving."[262] Camden officials report that the police department wants residents to know that the city's streets are theirs.[263] Indeed, some Camden police officers, including the Chief of Police, have marched with local Black Lives Matter activists.[264] It is important to highlight the role of local activists in pushing the newly formed police department to adopt policies, including use-of-force policies, that have resulted in improvements.[265] As Camden resident Stephen Danley points out, "Camden is not a story of how disbanding and creating a new force magically fixes policing, it is a story of how community persistence

---

[261] *See* Scottie Andrews, *This City Disbanded Its Police Department 7 Years Ago. Here's What Happened Next*, CNN (June 9, 2020, 11:23 PM), https://www.cnn.com/2020/06/09/us/disband-police-camden-new-jersey-trnd/index.html [perma.cc/6U3R-6UGH].

[262] *Id.* (internal quotations omitted). The Camden Police Department's community outreach includes pop-up barbecues, ice cream trucks, and drive-in movie nights for residents. *Id.*

[263] *Id. But cf.* John Bacon & Jimmy Bernhard, *St. Louis Police Chant 'Whose Streets? Our Streets!' After Violence Sparks 80 Arrests*, USA TODAY (Sept. 18, 2017, 12:16 PM), https://www.usatoday.com/story/news/nation/2017/09/18/protesters-march-peacefully-st-louis-after-violence-sparks-80-arrests/676211001/ [https://perma.cc/79RV-NV6T].

[264] *Id. See also* Katherine Landergan, *A City That Really Did Abolish the Police*, POLITICO.COM (June 12, 2020, 4:30 AM), https://www.politico.com/news/magazine/2020/06/12/camden-policing-reforms-313750 [https://perma.cc/M423-BDWP] (stating that the Camden police chief marched with Black Lives Matter protestors in the days following George Floyd's death). The restructuring of the Camden Police Department has not been without its critics. Although the department has increased the racial diversity of its force, nearly half of all Camden police officers are White in a city that is 93% minority. *Id.* Additionally, critics note that Camden has failed to post policing data online despite its participation in a federal program aimed at increasing transparency. *Id.* Camden citizens continue to demand reforms, including the creation of an independent civilian review board and improvements in the police department's efforts to recruit diverse officers. *Id.*

[265] *See* Stephen Danley, *Camden Police Reboot Is Being Misused in the Debate over Police Reform*, THE WASH. POST (June 16, 2020, 5:00AM), https://www.washingtonpost.com/outlook/2020/06/16/camden-nj-police-reboot-is-being-misused-debate-over-police-reform/ [https://perma.cc/BRJ3-T2RE].

can lead to meaningful change and how force-reduction policies can, in fact, reduce force."[266]

I believe that training and education initiatives addressing rape myths and racial stereotypes can be effective in police departments that have undergone a reformation like the one described above.[267] Even in departments where police officers no longer respond to nonviolent calls, they would continue to handle reports of rape and sexual assault. Therefore, they must be properly trained to recognize and avoid relying on rape myths and racial stereotypes. This training would include education on adultification bias.

### *B. Educating Judges and Jurors*

Court systems can play an important role in educating judges and jurors on adultification bias. The Violence Against Women Act (VAWA) authorizes funding for the training of state court judges and other court personnel concerning rape myths and racial stereotypes;[268] however, Congress has not reauthorized VAWA as of the publication of this Article.[269] If Congress reauthorizes VAWA in the near future, its grant funding provisions present a great opportunity for court systems to educate their judges. Similarly, some courts routinely provide education to jurors on implicit bias.[270] They can easily add a more specific discussion of adultification bias where it is appropriate to do so.

---

[266] *Id.*

[267] In formulating police programs that address bias, municipalities must ensure that the content of these programs does not include components that actually increase rather than reduce participants' reliance on bias. Lorie Fridell, who has conducted implicit bias training for hundreds of police departments across the country, including the New York Police Department and the Minneapolis Police Department, says she informs officers that stereotypes about Blacks committing more crime are partially based in fact. *See* Jeremy Stahl, *The NYPD Paid $4.5 Million for a Bias Trainer. She Says She's Not the Solution*, SLATE (June 18, 2020, 1:32 PM), https://slate.com/news-and-politics/2020/06/lorie-fridell-implicit-bias-policing.html [https://perma.cc/PM9D-4M77]. Fridell also tells officers that Black people may experience more violence at the hands of the police because they more often resist arrest. *Id.* When asked whether these statements validate rather than discredit racial stereotypes, Fridell says she must make these admissions to establish credibility with the officers and that she follows with a statement that most Blacks do not commit crimes. *Id.* Fridell cannot offer data showing the effectiveness of her approach, but if she is validating rather than dismantling racial stereotypes, then I believe at least one widely-used implicit bias training program is doing a major disservice to law enforcement officers and the communities they serve. *See id.*

[268] *See* 34 U.S.C. §§ 12371–12372; *see also* Boux, *supra* note 216, at 250.

[269] *See* Meghan Roos, *24 Attorneys General Urge Senate to Reauthorize Violence Against Women Act Amid Rising Concerns of Domestic Violence*, NEWSWEEK (May 5, 2020, 3:22 PM), https://www.newsweek.com/24-attorneys-general-urge-senate-reauthorize-violence-against-women-act-amid-rising-concerns-1502126 [https://perma.cc/83B8-QT4R] (stating that Congress' reauthorization of VAWA expired in February 2019).

[270] *See, e.g.*, Western Washington District Court, *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://www.youtube.com/watch?v=hdjBbfdRLkA [https://perma.cc/3R2B-3YFZ] (educating jurors on the effects of implicit bias and offering techniques for reducing those effects).

The training I envision for police officers, judges, and jurors would include education on racial stereotypes, rape myths, and intra-community factors that sometimes result in victims' reluctance to cooperate with law enforcement authorities.[271] This training would also address society's tendency to view Black girls as adult women and the impact that this adultification can have on an alleged victim's credibility.[272]

### *C. Education on Systemic Racism and Training on Courtroom Practices*

Because prosecutors play such an important role in the functioning of the criminal justice system, they must learn about the historical and modern-day role that race has played in the work prosecutors do. Without an understanding of the influence of race on the justice system, prosecutors may be unable to avoid repeating history. This education, which should include a focus on racial stereotypes, rape myths, and intersectionality, must begin in the law school classroom and continue throughout a prosecutor's career.

Rather than expecting future prosecutors and other law students to learn about the justice system's history of racism during an upper-level critical race theory course, law professors must teach this history in required law school courses. Since the killings of George Floyd, Breonna Taylor, and Rayshard Brooks, among others, forced the country to reckon with the systemic racism present in the criminal justice system,[273] law school administrators have advocated for a change in the structure of legal education that would promote anti-racist lawyering.[274] To that end, I believe that the first-year required law school curriculum must include content on the impact of systemic racism. This content would include an emphasis on implicit racial bias, intersectionality, and adultification bias.

With regard to the biases that impact Black girls and women when they report sexual violence, researchers have found that prosecutors often reject cases not because they harbor biases, but because they are fearful that jurors' biases will result in acquittals.[275] Therefore, in addition to learning about the

---

[271] *See* Sections I–III, *supra*.

[272] *See* text accompanying notes 74-85, *supra*.

[273] *See* Jorge L. Ortiz, *'It's Nothing but Pain': The Latest on the Cases of Violence Against Black People that Sparked America's Racial Reckoning*, USA TODAY (Sept. 9, 2020, 6:01 AM), https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002/ [https://perma.cc/PHW2-7GFA].

[274] *See* Danielle M. Conway et al., *Law Deans Antiracist Clearinghouse Project*, ASS'N OF AM. L. SCHS., https://www.aals.org/antiracist-clearinghouse/ [https://perma.cc/P43D-X2TW] (Oct. 12, 2020) ("This antiracist work requires deans to lead our law schools according to visionary statements and actions that demonstrate a commitment to delivering on an antiracist program of legal education. This antiracist work requires auditing our programs of legal education to assess our progress toward diversifying our faculties, our staff, and especially our student bodies, which in turn diversify our profession.").

[275] *See* Section III.B, *supra*.

impact of systemic racism and racial bias in law school, prosecutors must be taught to anticipate and navigate the biases of other players in the justice system.

This training, which could occur in a trial advocacy course during law school or as part of a new prosecutor's onboarding, should include a discussion of voir dire questioning that is effective in ferreting out biased jurors[276] as well as the crafting of jury instructions that explicitly discuss racial stereotypes.[277] The most impactful aspect of the training would concern the effective use of expert testimony to educate jurors on the prevalence of adultification bias in sexual assault cases involving Black girls. Some courts have admitted expert testimony on the prevalence of implicit bias,[278] and many have allowed prosecutors to combat popular rape myths using expert testimony on rape trauma syndrome.[279] Blanche Cook argues for the use of expert testimony in sex trafficking and intraracial sexual assault cases in order to focus jurors' attention on the defendant's rather than the victim's conduct: "Expert testimony may sanitize the victim's testimony from the taint of racism, sexism, and classism, which may take the form of victim blaming, hypersexualizing the victim, and immunizing the defendant through 'the slut defense.'"[280]

In sexual violence cases involving Black girls, prosecutors should also consider the use of expert testimony regarding adultification bias. Adultification bias is a form of implicit bias that reflects traditional and modern-day misconceptions about Black girls.[281] Like other forms of expert testimony

---

[276] *See* Thompson, *supra* note 128, at 1297–1300 (proposing the use of a voir dire questionnaire that encourages venire persons to disclose their biases).

[277] *Id.* at 1300–06.

[278] *See, e.g.*, Samaha v. Wash. State Dep't of Transp., No. CV–10–175–RMP, 2012 WL 11091843, at *4 (E.D. Wash. Jan. 3, 2012) (admitting expert testimony on implicit bias in an employment discrimination case). *But see* Jackson v. Scripps Media, Inc., No. 18-00440-CV-W-ODS, 2019 WL 6619859, at *6 (W.D. Mo. Dec. 5, 2019) (excluding expert testimony on implicit bias because it would not help the jury determine whether defendant intentionally discriminated against former employee).

[279] *See, e.g.*, People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990) ("Because cultural myths still affect common understanding of rape and rape victims and because experts have been studying the effects of rape upon its victims only since the 1970's, we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror. For that reason, we conclude that introduction of expert testimony describing rape trauma syndrome may under certain circumstances assist a lay jury in deciding issues in a rape trial."). The recent trials of Bill Cosby and Harvey Weinstein featured expert testimony on rape myths, including the misconception that a delay in reporting signals that the rape allegation is false. *See* Chris Francescani, *Expert Witness Details 'Rape Myths' in Harvey Weinstein Case*, ABC NEWS (Jan. 24, 2020, 4:39 PM), https://abcnews.go.com/US/expert-witness-details-rape-myths-harvey-weinstein-case/story?id=68504135 [https://perma.cc/7GW5-AV8R].

[280] Blanche Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 211 (2019).

[281] *See* text accompanying notes 69-80, *supra*.

that provide information outside the ordinary understanding of lay jurors,[282] testimony on adultification bias would provide jurors with a better lens through which to view the evidence offered at trial. Importantly, the strategic use of expert testimony in these cases is an essential tool for a prosecutor who might otherwise reject a case because of anticipated juror bias.[283]

## Conclusion

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

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

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

---

[282] *See* Fed. R. Evid. 702(a) (stating that expert testimony is admissible where it is based on "scientific, technical, or other specialized knowledge" and "will help the trier of fact to understand the evidence or to determine a fact in issue").

[283] The potential admissibility of expert testimony on adultification bias pursuant to the rules of evidence is a topic for future research.