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The Violent State: Black Women's Invisible Struggle Against Police Violence

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THE VIOLENT STATE: BLACK WOMEN'S INVISIBLE STRUGGLE AGAINST POLICE VIOLENCE

MICHELLE S. JACOBS*

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INTRODUCTION

The theme of this special issue, Women and Law Enforcement, is particularly timely. Incidents of police brutality have reached a new level of public visibility. Though not everyone agrees on whether the use of violence by the police is inappropriate, conversations about police violence are occurring everywhere. An exploration of the topic of Women and Law Enforcement would not be complete without at least one article that puts Black women at the center of the lens of analysis, particularly as it relates to the state-sponsored violence Black women experience at the hands of law enforcement. This Article is about law enforcement’s violence towards *Black women* specifically. The reader should not feel free to substitute the phrase “women of color” where “Black women” has been written. The Article is not about “women of color.” For decades now, mainstream feminists have attempted to discuss violence against women, while relegating the experiences of Asian women, Native American women, Latinas, and Black women into one category called “women of color.” Scholarship describes the experiences of White women as normative, all other women experiences are subsumed in those. For over twenty years now, the data (when you can find data specifically about non-White women) consistently shows that the communities of non-White women do experience violence, both at the hands of the state, as well as at the hands of intimates, but that violence manifests differently in each community.¹ Intuitively, that would make sense as the women in all communities are viewed through the stereotypical lens created by Whites for each ethnic/racial community.² The

1. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY REP. 741 (2017), <https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6628a1.pdf> [<https://perma.cc/SZN7-HXEZ>].

2. See, e.g., Cheryl Caballero, *Race and Gender Based Stereotyping of Asian Women: Pointing at Western Society’s “Elephant in the Room,”* RICEPAPER (May 21, 2010), <https://ricepapermagazine.ca/2010/05/race-and-gender-based-stereotyping-of-asian-women-pointing-at-western-society%E2%80%99s-%E2%80%9CElephant-in-the-room%E2%80%9D-9D-15-2> (discussing Asian women as hypersexualized innocents or prostitutes); Liz

lumping of their experiences into one homogenized category masks the complexity of violence in each community and renders the differences between the communities invisible.³ Black women have a very specific history with the state and law enforcement that is not replicated among other women's communities, and it is that unique situation that is the focus of this Article.

Black women's interaction with the state, through law enforcement, is marked by violence. Black women are murdered by the police.⁴ They are assaulted and injured by the police.⁵ They are arrested unlawfully by the police;⁶ and finally they are tried, convicted and incarcerated for defending themselves against nonpolice violence.⁷ State violence against Black women is long-standing, pervasive, persistent, and multilayered, yet few legal actors seem to care about it. This Article will bring together the strands of scholarship that exists across several fields on the dilemma of state sponsored violence against Black women, to highlight for legal scholars the depth of the problems Black women experience. The relationship between Black women and the state was birthed in violence, through the establishment of slavery in the colonial world. Part I of this Article explores the historical roots of Black women's interaction with the state. The historical exploration is necessary because in the foundational years of interaction between Black women and White colonists the process of dehumanization and genesis of cultural stereotypes were created. Throughout the research cited in this Article, contemporary linkages to both legal policy, as well as law enforcement behavior will be made to stereotypes fostered and maintained through slavery.

Black women are subjected to every type of law enforcement violence imaginable. The most severe violence causes death, but

Dwyer, *'HispanicGirlsUnited' Hashtag Smashes Ethnic Stereotypes*, TAKEPART (June 27, 2015), <http://www.takepart.com/article/2015/06/27/hispanic-girls-united> [<https://perma.cc/F257-SMNH>]; Bethany R. Stoller, *Not Your Pocahontas: How Stereotypes Affect Native American Women*, SOAPBOXIE (June 29, 2017), <https://soapboxie.com/social-issues/Is-the-Trump-Presidency-Good-for-Native-Americans> [<http://perma.cc/ZWF5-YPDN>].

3. I recently had a conversation with Caroline LaPorte of the National Indigenous Women's Resource Center, about the use of the term "women of color." LaPorte stated that for years she resisted using the term. From her perspective, Native women face legal issues that simply do not exist for other communities of women facing violence. For example, Native women face the issue of navigating their tribal sovereignty against limitations the federal government places on the ability to exercise sovereignty. Eventually, she accepted being included within the term, because Native women could not access VAWA funding unless they did so.

4. See *infra* Section II.A text accompanying notes 83–95.

5. See *infra* Section II.B.1 text accompanying notes 122–207.

6. See *infra* Part IV text accompanying notes 304–462.

7. See *infra* Section IV.B text accompanying notes 325–58.

Black women are routinely brutalized by the police in ways that do not cause death. Part II of this Article is broken into two sections. The first will cover police killings of Black women. Police killings of Black people receives national media attention today, principally as a result of the #BlackLivesMatter movement. Most of the attention focuses on the issue of the police killings of Black men. Grassroots movements and independent journalists are now tracking police killings because data from law enforcement on the number of Black people killed by the police is woefully inadequate.⁸ Even that scarce data however, rarely does a statistical gendered analysis, which means that the deaths of Black women at the hands of the police do not receive the level of attention that the killings of Black men receive. The #SayHerName project is attempting to bring these women's stories to the forefront of the public discussion.⁹ The second part of the section will explore the conditions under which Black women are physically assaulted by the police. Here again, data is scarce and researchers few, but from what is available, disturbing trends in law enforcement become apparent.

The level of sexual violence against Black women is high, Part III of the Article seeks to highlight when the police rape and sexually assault Black women. Police rape is a complex matter on many levels. Can any woman who is raped by the police, much less a Black woman, report that rape to the police? The realities of community relationships formed with the police dramatically impact a Black woman's ability to gain legal protection when her rapist is a cop. Intimately connected to this issue, is the law's reaction to claims that a Black woman has been raped. Legal and social science literature demonstrates that prosecutors may be reluctant to take a case of rape forward where the victim is a Black woman.¹⁰ That reluctance is often tied to who or what the woman is and or how the jury will perceive the woman. In this context, vulnerable populations of women are at risk of having their cases refused by the state.

8. The former director of the FBI, James Comey, acknowledged that the lack of data on police killings was embarrassing. See Aaron C. Davis & Wesley Lowrey, *FBI calls lack of data on police shootings 'ridiculous,' 'embarrassing,'* WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html?utm_term=.32a034075f80 [<https://perma.cc/V3QA-LH8M>].

9. Andrea J. Ritchie et al., *SAYHERNAME: Resisting Police Brutality Against Black Women*, AF. AM. POL'Y FORUM (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/555cced8e4b03d4fad3b7ea3/1432145624102/merged_document_2+%281%29.pdf [<https://perma.cc/S9U9-CLHF>] (highlighting the regularity with which black women are killed and brutalized by the police and to help ensure that the movement for racial justice also includes a gendered analysis).

10. See *infra* Section III.C text accompanying notes 273–303.

Ultimately, the question must be asked whether all Black women are always in the category of vulnerable women such that their rape complaints are not viewed as viable. The end of the section will also cover the more modern phenomenon of police officers trafficking Black girls and women.

Intimate partner violence (IPV) continues to be a serious problem in the United States.¹¹ Police families are not immune from experiencing violence at the hands of police officers.¹² Part IV begins with police violence within the home. Intimate partner violence among law enforcement and the military is higher than the rate of violence in civilian populations.¹³ Police who can batter can also batter Black women. However, obtaining any satisfying statistics about police batterers can be extremely difficult, and even more so if one is searching for data on the race of victims of police battering. The second section in Part IV will focus on violence that occurs when the police respond to Black women who complain of abuse at the hands of an intimate partner. Research, sparse as it is, shows that Black women are more likely to be arrested by the police when they report intimate violence.¹⁴ In this section, the root failure of feminist and anti-violence advocates to do a complete race and gender analysis during the push for adoption of the original Violence Against Women Act will be discussed. It is argued that the push to have VAWA adopted, and to encourage greater police participation in the criminal justice response to intimate violence, led the movement to ignore serious warning signs that Black women would fare poorly under the legislation.¹⁵ The problems associated with mandatory arrest, dual arrest and no drop prosecution provisions for Black women will be discussed. Within Part IV, the plight of Black women who defend themselves from the batterers and are prosecuted for murder will close out the section.

Tensions can arise within the feminist movement when Black women call for their issues to be placed at the center of analysis. For predominately White organizations, there is political capital to be gained by arguing that all women are impacted by oppression,

11. See *infra* Section IV.A text accompanying note 304.

12. See IACP NAT'L LAW ENF'T POLICY CTR., DOMESTIC VIOLENCE BY POLICE OFFICERS (2003), <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencebyPolicePaper.pdf> [<https://perma.cc/2VJX-LH54>].

13. *Id.* See also Ashley Kewish & Alex Cabrero, *Statistics of domestic violence, divorce higher for police families*, KSL (Jan. 17, 2014), <https://www.ksl.com/?nid=148&sid=28395356> [<https://perma.cc/NWR2-AYFN>].

14. See *infra* Section IV.B text accompanying notes 325–58.

15. See discussion *infra* Section V.B of BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012).

injustice, violence in the same way.¹⁶ But the small amounts of data that are available consistently demonstrate quite the contrary. Black women experience these things, particularly violence from the state, in a qualitative and quantitative level that is very different from how middle class White women experience state-sponsored violence.¹⁷ Part V explains why it matters to specifically to Black women that their trauma be acknowledged. Secondly, I explore why mainstream anti-violence groups and other feminists organizations should be concerned about what is happening to Black women specifically. Finally, the Article concludes by highlighting why moving the discussion of violence against Black women from the dusty corners of isolation closer to the center of policy planning, drafting of legislation, and political brainstorming matters to both Black women and to the larger feminist and anti-violence communities.

I. THE HISTORICAL VIEW

The relationship between Black women and the state was birthed in violence. Both Black men and women could be killed, maimed, mutilated at the will of the slave holder with no redress or sanctuary for the so gravely injured.¹⁸ Certainly Black men were killed and maimed, as were Black women, but women were also violently raped and sexually abused by both the slave holder, and his employees.¹⁹ The raping of Black women also became an economic necessity when importation of Africans was banned in 1807.²⁰ In order for the prosperity of slave holders to continue, they had to be able to procure human chattel from somewhere. When importation was banned, the holders turned towards making their own human captives, frequently by raping Black women or “breeding”

16. See *infra* Section IV.C text accompanying notes 359–97.

17. See Terrell J. Starr, *Why is no one talking about black women abused by police?*, THE WEEK (Dec. 9, 2015), <http://theweek.com/articles/591811/why-no-talking-about-black-women-abused-by-police> [<https://perma.cc/LSQ9-5RZK>].

18. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 36 (1978); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619–1860 143 (1996) (recalling that the right to kill and maim belonged only to the slave holder. Any other White, renting or leasing humans in captivity were held to account, at least financially, if the captive was killed or injured. This had little to do with mercy, but rather rested in the property rights of the slave holder. The regulation of the hiring and leasing of slaves was regulated by contract law).

19. See Jennifer Hallam, *The Slave Experience: Men, Women, and Gender*, PBS (2004), <https://www.pbs.org/wnet/slavery/experience/gender/history.html> [<https://perma.cc/4G54-MZ8J>].

20. For a discussion of “slave breeding” prior to the importation ban, see DOROTHY ROBERTS, KILLING THE BLACK BODY 24 (1997) (stating that though transatlantic importation of slaves was banned in 1807, a vibrant trade continued until 1857).

them (often against their will) with other Black male slaves.²¹ Law supported that approach, and well-established English rules of descent and inheritance were changed so that White slave holders could produce as many children through rape as they would like without having to worry about claims upon inheritance by the children produced by the brutal action.²²

For a society that considered itself to be Christian, it was necessary for Whites to be able to justify the raping, maiming, and killing of Black women and men. Throughout the entire slave holding period, descriptions and stereotypes about Blacks played heavily in the literature and news of the day.²³ Black men were violent savages and Black women were lascivious, wild creatures without morals, who needed to be tamed in order to get any work out of them.²⁴ The use of such language reassured Whites who may have been uncertain about the legitimacy of holding human beings in captivity, that these individuals were not in fact human, but closer to the animal family.²⁵ Such was the case through to the end of the Civil War in 1865, which represented almost exactly two hundred years of law normalizing violence towards Black men and women.

Americans tend to look back at the end of the Civil War as if something magical happened at that time. When General Lee surrendered his sword, the Union was saved, Blacks were emancipated, and liberty and equality for all became a reality. Of course, historically, that was not the reality. After a seven-year period of reconstruction, the country settled down into the next 100 years marked by a legal process of segregation known as Jim Crow.²⁶ During this period of time Black women continued to be killed and sexually assaulted, and the law provided very little protection.²⁷ In fact, rather than providing a sanctuary for Black women from violence, the law aided those who were violent towards Black women.²⁸ The

21. *Id.*

22. HIGGINBOTHAM, *supra* note 18, at 43–44.

23. See S. Plous & Tyrone Williams, *Racial Stereotypes From the Days of American Slavery: A Continuing Legacy*, 25 J. APPLIED SOC. PSYCHOL. 795, 795 (1995).

24. See A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only As An Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1056–57 (1992) (contrasting states which defined rape specifically as a crime that could only be committed against White women, with states that had no such limiting language, but still had no cases of a prosecution for rape where a Black slave woman was the victim).

25. *Id.* at 1053.

26. MICHELLE ALEXANDER, *THE NEW JIM CROW* 1 (2010).

27. See Ruth Thompson-Miller & Leslie H. Picca, *‘There were Rapes!’: Sexual Assaults of African American Women and Children in Jim Crow*, 23 VIOLENCE AGAINST WOMEN 934, 935 (2017).

28. *Id.* at 936.

tropes about Black women and loose sexuality continued to play a central part of the race dialogue among Whites.²⁹ And law reflected the normative view that Black women were not civilized enough to be brought within the bounds of the protection of law. Stereotypes about Black women developed during this historical era are still dominant in state policy today. Public benefits law, educational law, delinquency and neglect policy, and all aspects of criminal law have embedded the stereotypes as the normative foundation for how government evaluates, judges, and punishes Black women.³⁰

A. Stereotypes About Black Women

There are many stereotypical images of Black people that developed during the slave period which were accepted into the language of legislation and governed judicial action. After Emancipation many of these tropes continued to be used both culturally and legally, and sit at the bedrock of the development of much of what is modern law today. There are three culturally held beliefs about Black women that are relevant to the legal determination of whether Black woman can be victims of police killings, of sexual assault, and of domestic violence.³¹ In the first instance, judges and jurors will wonder whether a Black woman is promiscuous and of low moral character, such that she, herself is responsible for being raped or sexually assaulted, or in the extreme, whether she is even capable of being raped or assaulted.³² Secondly, they will wonder whether Black women are credible such that when they report, either under oath or just at the police station, that they've been victimized, their words can have value and be believable.³³ Finally, they may believe that Black women are overly aggressive and accustomed to violence within their environment, such that when they report an incident of intimate partner violence, the police, prosecutors, judges,

29. DEBORAH G. WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 164 (1985).

30. Dorothy Roberts's entire body of scholarly works are appropriate here. A few examples of such suffice: Dorothy E. Roberts, *Reconciling Equal Protection Law in the Public and in The Family: The Role of Racial Politics*, 162 U. PA. L. REV. 283, 286 (2014); *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1492 (2012); *The Dialectic of Privacy and Punishment in Gendered Regulation of Parenting*, 6 STAN. J. C.R. & C.L. 191, 196 (2009); *Child Welfare and Civil Rights*, U. ILL. L. REV. 171, 176 (2003); *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 950 (1997); *Biology, Justice, and Women's Fate*, 3 U. CH. L. SCH. ROUNDTABLE 465, 468 (1996); *The Value of Black Mother's Work*, 26 CONN. L. REV. 871, 873 (1994); *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DEN. U. L. REV. 931, 945 (1995).

31. See *infra* Section I.A.1–3 text accompanying notes 31–78.

32. See *infra* Section I.A.1 text accompanying notes 35–46.

33. See *infra* Section I.A.2 text accompanying notes 47–63.

and jurors are more likely to see them as mutual combatants and not as victims.³⁴

1. *Black Women as Governed by Libido and Loose Morals*

Throughout the colonial and slave era, White men created a caricature of Black women as sexual animals, who had no control over libido.³⁵ Throughout literature references were made to Black women having sex with apes.³⁶ Thomas Jefferson, himself, repeated this White man's fantasy.³⁷ This caricature of Black women is referred to as the Jezebel stereotype. The typical stereotypes of Black women have been well developed by scholars, but the most common explanation of the Jezebel image is that she was "a purely lascivious creature: not only was she governed by her erotic desires, but her sexual prowess led men to wanton passion."³⁸ The popular image of this Black oversexed creature was a convenient cover for White men brutally raping Black women.³⁹ The women wanted them to do it! Jezebel provided a woman who could be juxtaposed against the notion of a "true" woman, a feminine, chaste, White woman.⁴⁰ Law reflected the belief that Black women were promiscuous. Every colonial state that adopted a rape statute defined the crime as an offense that happened to White women.⁴¹ No White man could ever rape a slave woman.⁴² Even as between slaves, forcible intercourse against the consent of the Black female slave was not rape.⁴³ One judge commenting on the attempted prosecution of a slave for raping a Black girl under ten years of age stated: "[O]ur laws recognize no marital rights as between slaves; . . . their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery."⁴⁴

34. See *infra* Section I.A.3 text accompanying notes 64–78.

35. See WHITE, *supra* note 29, at 38.

36. *Id.* at 30. See *infra* Part III on contemporary links between dehumanization and police violence.

37. WHITE, *supra* note 29, at 30 (citing Thomas Jefferson, Notes on Virginia); MORRIS, *supra* note 18, at 306.

38. ROBERTS, *supra* note 20, at 10–11. PATRICIA H. COLLINS, CONTROLLING IMAGES AND BLACK WOMEN'S OPPRESSION, RACE & ETHNICITY 266, 271 (1991).

39. See ROBERTS, *supra* note 20, at 12 (exploring the Jezebel myth and the corollary that oversexed Black women breed more frequently and easier than White women. Plantation owners could thereby justify the exploitation of Black women's reproductive capacity for economic gain).

40. COLLINS, *supra* note 38, at 266. Collins lists the virtues that are essential to "true" womanhood as piety, purity, submissiveness, and domesticity. Black women could not be true women as they lacked piety and purity.

41. MORRIS, *supra* note 18, at 305.

42. *Id.*

43. *Id.* at 306.

44. *Id.* (citing an 1859 case about the rape of a slave under ten years old).

After Emancipation, sexualized imagery of Black women continued to be common. "Black women continued to be perceived by [W]hite America as individuals who desired promiscuous relationships."⁴⁵ Scholar Deborah White states that through more than two-thirds of the twentieth century "no Southern [W]hite male was convicted of raping or attempting to rape a [B]lack woman."⁴⁶ The persistence of the sexualized imagery of Black women impacts today's legal process and is certainly relevant to issues such as whether the police and/or prosecutors believe a Black woman can actually be raped or was actually raped as opposed to engaging in consensual sexual activity that she may later regret.

2. *Black Women as Liars*

Initially in law, all women's testimony was treated "with suspicion and distrust."⁴⁷ Eventually, as the cult of true woman developed, White women were elevated to be virtuous, pure, and innocent, while Black women were defined as criminals.⁴⁸ During slavery Blacks were not permitted to give testimony against any Christian White person.⁴⁹ They were permitted to give testimony against other Black or mulattoes.⁵⁰ In general however, slaves were not viewed as being capable of truthfulness.⁵¹ "[African women were believed to be] ignorant, . . . treacherous, thiev[es] and mistrustful."⁵² As with the myth of the promiscuous Black woman, beliefs that Black women were natural liars continued after Emancipation. Feminist historians have provided examples of judicial comments regarding

45. WHITE, *supra* note 29, at 164.

46. *Id.* (citing the National Commission on the Causes and Prevention of Violence (1969)). The commission looked at the prevalence of White male rape against Black women and concluded "White males have long had early institutionalized access to Negro women with relatively little fear of being reported." *Id.*

47. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Woman as Liars*, 3 J. GENDER RACE & JUST. 625, 633 (2000).

48. The testimony of women, even White women, remained suspect when it was given about rape and sexual assault. Lord Hale encouraged the common law courts to eye the testimony of a complaint suspiciously and special evidentiary rules were adopted to challenge a woman's veracity.

49. HIGGINBOTHAM, *supra* note 24, at 994–97 (detailing the history of legislative changes that restricted the rights of Black people held in slavery to testify).

50. *Id.* at 996.

51. *Id.* at 994; MORRIS, *supra* note 18, at 232 (citing, for example, a nineteenth-century quote from T.R.R. Cobb, "[a slave], as a general rule, is mendacious, is a fact too well established to require production of proof . . .").

52. Yarbrough & Bennett, *supra* note 47, at 635 (citing Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1033 (1995)).

Black women's veracity. For example in a case from 1912, where a Black domestic alleged her White employer sexually assaulted her, the judge wrote, "[I] will never take the word of a nigger against the word of a [W]hite man."⁵³

Professor Marilyn Yarbrough expands the stereotypical categories of Black women to include the Greek story of Cassandra, which she believes reflects the legal system's unwillingness to find Black women credible.⁵⁴ Yarbrough's essay was sparked by an incident with her own lawyer, who doubted the veracity of the facts she gave concerning a lawsuit over the valuation of real property.⁵⁵ She wrote that the African-American woman's racial and gender identity makes her "particularly and peculiarly susceptible to being disbelieved."⁵⁶ Yarbrough analyzed three cases that were contemporary during the time her article was written.⁵⁷ All three incidents were high press coverage and national media exposure sexual harassment claims; all three involved complaints of rape or sexual harassment; and all complainants were Black women.⁵⁸ The veracity of all three women was openly contested despite the fact that all three testified under oath.⁵⁹ Social scientists who study prosecutions of rape cases have documented juror resistance to finding Black women victims credible.⁶⁰ Yarbrough's observations about the way law treats Black

53. *Id.* at 647 (citing the work of historian Gerda Lerner).

54. *Id.* at 627–28. Yarbrough relates the story of Cassandra, a beautiful Greek woman who was given the gift of foresight by Apollo who had fallen in love with her. When she rejected his advances, he added a curse that no one would believe her visions. Yarbrough links the development of the caricature Sapphire, from the Amos and Andy shows, to Cassandra. Sapphire is one of the traditional stereotypical tropes of Black women. Sapphire is routinely described as spiteful, cunning, employs trickery to deceive her husband Kingfish. *Id.*

55. *Id.* at 626.

56. *Id.*

57. Yarbrough & Bennett, *supra* note 47, at 641–54.

58. *Id.* The three incidents were Anita Hill's testimony during the Clarence Thomas confirmation hearings, in which she testified about being sexually harassed by him when he was her supervisor at work; Desiree Washington was the Black woman who accused boxer Mike Tyson of rape; Tawana Brawley may be less well known today, but she was a young Black woman who accused a police officer of sexually assaulting her.

59. Senator Arlen Specter and others accused Hill of perjury and her testimony was received with great hostility. *Id.* at 641–42. Desiree Washington was reluctant to come forward with her allegations against Mike Tyson because she believed no one would believe her, and indeed both her veracity and her morals were questioned. *Id.* at 652–54. Tawana Brawley accused six police officers of sexually assaulting her. One of the officers committed suicide but as time passed, the prosecutors and the public were not willing to find her credible. She was accused of fabricating her own sexual assault. *Id.* at 651–52.

60. Yarbrough & Bennett, *supra* note 47, at 649 (citing GARY LAFREE ET AL., RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 219–20 (1989)). LaFree quoted one juror who said: "[n]egros have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."

women's testimony is consistent with what practitioners relate.⁶¹ Legal scholars and legal practitioners also find that judges tend to weigh the testimony of their Black female clients as less credible than the testimony of their abusers.⁶²

3. *Black Women as "Man-Like" and Aggressive*

The myth that Black women are aggressive combatants is more difficult to trace to slavery, but probably has its origins in the beliefs that Black women were man-like. During slavery Black women were not spared from physically demanding work. Black women who worked in the field did the same work men did. They were subject to the same punishments male slaves received: whipping, branding, and mutilations.⁶³ Whites believed that Black women did not have the same delicate constitutions that White women had, and that they were more suited to work as beast of burden.⁶⁴ Sojourner Truth's speech at the women suffrage convention in 1851 is often referenced because she had to bare her breast to silence those who questioned whether she was actually a woman.⁶⁵ During her speech, Truth compared her ability to work with that of any man, but pointed out she was still a woman and believed women should have the rights of a man.⁶⁶ White indentured women rarely worked in the field, but when they did so it was usually as punishment.⁶⁷ White colonialists believed that only debased and degraded women worked in the field.⁶⁸

LaFree's work is also cited in the study of the exercise of prosecutorial charging discretion in rape cases where there is a Black female victim. *See* WHITE, *supra* note 29, at 164–65 (citing feminist author Susan Brownmiller who also found that Black female victims were not believed by White jurors). It is also possible that these cases represent the intersection of two stereotypes, the one on promiscuity as well as the belief that Black women are liars.

61. *See generally* Geneva Brown, *Ain't I a Victim: The Intersection of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147 (2012).

62. *See id.* at 154–55 (contrasting the experiences of a poor Black female client seeking an order of protection versus other White clients).

63. BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 16 (1981).

64. *Id.* at 23.

65. *Id.* at 159.

66. There is controversy today over whether the form of the speech most people are familiar with, replete with Southern dialect, is representative of the actual speech she gave. Some scholars say that the summary of her speech printed right after the speech was given was the more accurate version, while the one most people are familiar with was published twelve years later by a White woman whom scholars allege added the southern dialect and changed some facts. *Why is there more than one version of Sojourner Truth's famous 1851, "Ain't I a Woman" speech?*, THE SOJOURNER TRUTH PROJECT, <https://www.thesojournertruthproject.com> [<https://perma.cc/Z6T3-T4E2>].

67. HOOKS, *supra* note 63, at 22.

68. *Id.*

Racist mythology about Black women's lack of femininity continued to appear in the press well after the end of slavery. Scholar Kali Gross documents the cases of Black women who were accused and/or convicted of crimes in Philadelphia between 1880 and 1910, and her book provides examples of the demonization of Black women.⁶⁹ In Philadelphia, the news stories referred to "Colored Amazons" who attack helpless White men.⁷⁰ According to Gross, Black women were described as "unflinching in their fiendishness, brutal in their attacks, and sexually unrestrained, and they enacted a greed that stripped [W]hite men of life and property."⁷¹ She was a "dangerous urban aggressor."⁷² Gross's work is unusual, because it specifically looks at Black female offenders and because she also had access to the statistical data that was pertinent for the time. In a statement that could easily be written of today's Black female offender, Gross found that although Black female offenders only accounted for two percent of the penitentiary population, they nevertheless appeared in crime narratives as being among the worst criminal offenders.⁷³ She also contrasts news portrayals of White women who committed the similar offenses and showed that "[n]ews accounts rarely depicted [W]hite women as being abnormally strong, evil, or bereft of remorse. On the contrary, the descriptions of their emotional outbursts in courtrooms emphasized their womanhood and often overshadowed their criminality,"⁷⁴ as contrasted with Black women's outbursts which were considered examples of "bloody rage . . . symptomatic of [B]lack female depravity. . ."⁷⁵ She argues that the Colored Amazon stereotype fueled bias among White judges which supported disparities in the way they responded to crimes committed by Black women as opposed to those by White women, leading to more severe sentences for Black women.⁷⁶

In contemporary times, judges still view Black women as aggressive and prone to violence. Unfortunately, there are no in-depth

69. KALI N. GROSS, *COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910* 101 (2006).

70. *Id.* In this chapter of her book she contrasts the public images of the women who were accused of crimes with the actual facts adduced during their trials. Of course, the facts, give a different impression from the racist imagery presented in the news.

71. *Id.* at 105.

72. *See id.*

73. *Id.* at 111. She found most of the convictions were for larceny, but the press described these women as "heinous."

74. *Id.* at 117.

75. GROSS, *supra* note 69, at 117. Gross also cites Lombroso's work in *The Female Offender*, where he likens the Black female offender's criminality with the fact she is so similar in make-up to a Black male: "[S]o huge are their jaws and cheek-bones, so hard and coarse their features. And the same is often the case in their crania and brains." *Id.* at 134.

76. *Id.* at 123.

studies to establish why judges today endorse these stereotypes. However, advocates for Black women who are survivors of domestic violence do recount that their clients' cases are negatively impacted by such views.⁷⁷

II. BLACK WOMEN ARE MURDERED AND ASSAULTED BY THE POLICE

A. Invisible Homicides Committed by the Police

The lives of Black women are routinely erased by the police. Lawyer and activist, Andrea Ritchie, has, for almost twenty years called the public's attention to the killings, assaults, and rapes committed by the police against Black women, other women of color, and the transgender community.⁷⁸ The consciousness and will of the public to provide broad-based support to the early effort to highlight violence against Black women was lacking. The reasons for that lack of support was complex and had as much to do with community self-censure as it did with racism/sexism in both law enforcement and media.⁷⁹ Today, however, INCITE!, #BlackLivesMatter, and #Say HerName have created new opportunities to put the proper focus on the lost lives of these Black women at the hands of the state through its law enforcement mechanisms.⁸⁰

It is hard to educate the public about violence against Black women because it so rarely makes the news. The stories of their deaths may be newsworthy, but the fact that the victim or survivor is a Black woman can be buried. There is a long-standing problem with media coverage, or the lack thereof, of crimes committed against Black women. The lack of coverage was highlighted during the years when former prosecutor, turned media personality, Nancy Grace, reported on missing women. All of the women Grace reported about were White, and the obvious lack of coverage about missing Black

77. See *infra*, Section IV.B.

78. INCITE!, COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 138 (2016); Andrea J. Ritchie, #SAYHERNAME: *Racial Profiling and Police Violence Against Black Women*, 41 N.Y.U. REV. L & SOC. CHANGE 187, 187 (2016). Andrea Ritchie was a student at Howard University School of Law in 1999 and my research assistant. Even then, she already had a reputation as an activist working on the issue of police violence against Black women.

79. Black women are in the precarious situation of having to sometimes balance race loyalty against arguing for their own interests. See BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED, BLACK WOMEN 36–37 (1996).

80. INCITE! describes its organization as “a national activist organization of radical feminists of color advancing a movement to end violence against women of color and our communities through direct action, critical dialogue and grassroots organizing.” INCITE!, *About INCITE!*, <http://incite-national.org/page/about-incite> [<http://perma.cc/JM2L-C8A2>].

women led the late NPR anchor, Gwen Ifill, to coin the phrase “missing White woman syndrome” to describe the media’s exclusive focus on White women.⁸¹ Few mainstream media outlets cared whether a Black woman was missing or dead. Even with the new focus on police killings of Black people, it is still difficult to find the stories about any of the twenty-eight mentioned in #SayHerName. They rarely consume media attention in the way that the killing of Black men and boys did,⁸² which is not to say that coverage of the killing of men and boys should be reduced or abbreviated, but that the media should *also* cover the killings of women as well.⁸³ There was no database the authors could access to identify Black women killed or brutalized by the police. The project relied on the families of the women killed and their own researchers to compile the women’s stories.⁸⁴

1. Black Women with Mental Health Issues Are Particularly at Risk

In the Bronx last summer, Deborah Danner’s death at the hands of the police provided a thirty-two-year link between her death, the death of Eleanor Bumpurs in 1984, and the history of violence against mentally ill women in New York.⁸⁵ In an essay written in 2012, Danner referenced the death of Bumpurs, a sixty-six-year-old Black woman with mental health issues who was killed by the police as they attempted to evict her.⁸⁶ Danner wrote: “[w]e are all aware of the all too frequent news stories about the mentally ill who come up against law enforcement instead of mental health professionals and end up dead.”⁸⁷ After the Bumpurs killing, the New York City Police Department allegedly revised its guidelines

81. See MIA MOODY ET AL., *THE INVISIBLE DAMSEL: DIFFERENCES IN HOW NATIONAL MEDIA OUTLETS FRAMED THE COVERAGE OF MISSING BLACK AND WHITE WOMEN IN THE MID-2000S* 2 (2009) (discussing the difficulty of even getting a sample of news coverage of Black women versus White women to compare, as there was so little coverage of the stories of missing Black women).

82. Ritchie et al., *supra* note 9, at 6.

83. One could probably host several symposia examining why the media does not give broader coverage to women’s issues in general and to Black women’s issues specifically.

84. Ritchie et al., *supra* note 9, at 2.

85. Eli Rosenberg & Ashley Southall, *In Quick Response, de Blasio Calls Fatal Shooting of Mentally Ill Woman ‘Unacceptable’*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/nypd-sergeant-fatal-shooting-bronx-woman.html> [<http://perma.cc/XK8P-9NER>].

86. Mark Abadi, *Mentally ill woman wrote heartbreaking essay foreshadowing her own death at hands of police*, BUSINESS INSIDER (Oct. 20, 2016), <http://www.businessinsider.com/deborah-danner-essay-mental-illness-2016-10> [<http://perma.cc/M2FT-KFXW>].

87. *Id.*

for how to handle emotionally disturbed persons.⁸⁸ And yet, New York City police continued to kill emotionally disturbed persons just as Ms. Danner worried.⁸⁹ After Danner's death, the call went up by the mayor's office for a quick and thorough investigation, and some immediate sanctions were placed on the officer.⁹⁰ The preliminary investigation shows he failed to follow the police guidelines for interacting with emotionally disturbed persons.⁹¹ The officer did not use his Taser first and did not wait for assistance.⁹² This year, the Bronx District attorney, a Black woman, announced the officer involved was indicted, but the officer in the Bumpurs case was indicted as well though he was never convicted.⁹³ While, it is important for the public to feel confident that prosecutors will value the lives of these women, it is also important for systematic and attitudinal changes to occur, such that killing Black women who are mentally ill can stop in New York or anywhere else in the country.

The issue of whether the police are equipped to perform crisis intervention in ways that reduce lethality was discussed during the hearings conducted by former President Obama's Task Force on 21st Century Policing. At least two task force recommendations refer specifically to officer training to make sure they are competent to handle vulnerable citizens and to encourage collaborative team response to calls for crisis intervention.⁹⁴ #SayHerName documented

88. Alan Feuer, *Fatal Shooting in Bronx Echoes One from 32 Years Ago*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/fatal-police-shooting-in-bronx-echoes-one-from-32-years-ago.html> [http://perma.cc/Q8VD-G4EE].

89. Since Bumpurs's death, NYPD have killed any number of individuals with mental health issues, including another Black woman named Shereese Francis. James Thilman, *Did The NYPD Suffocate A Mentally Ill Woman To Death While Trying To Cuff Her?*, GOTHAMIST (Apr. 3, 2012, 5:32 PM), http://gothamist.com/2012/04/03/family_of_woman_allegedly_suffocate.php [http://perma.cc/U4A2-P2VW].

90. Al Baker, *New York City Police Sergeant Charged With Murder in Bronx Woman's Death*, N.Y. TIMES (May 31, 2017), <https://nyti.ms/2sn8lev> [http://perma.cc/9KRG-DXAB].

91. *Id.*

92. *Id.*

93. The officer's indictment was quashed on motion by a judge. Selwyn Rabb, *State Judge Dismisses Indictment of Officer in the Bumpurs Killing*, N.Y. TIMES (Apr. 13, 1985), <http://www.nytimes.com/1985/04/13/nyregion/state-judge-dismisses-indictment-of-officer-in-the-bumpurs-killing.html> [http://perma.cc/5T55-RF7B].

94. WASHINGTON, D.C.: OFFICE OF CMTY. ORIENTED POLICING SERVICES, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 15–16, 44 (2015), <http://files.policemag.com/documents/21stcpolicingtaskforce-finalreport.pdf> [http://perma.cc/67WP-H6NR] (recommending collaborative response under Recommendation 4.3 and using instruments of physical control on vulnerable populations under Recommendation 1.5.4). *See also id.* at 56 (recommending that Crisis Intervention should be part of basic training as well under Recommendation 5.6). The task force pointed out that law enforcement seem particularly unprepared to deal with calls where the object of the call has mental health issues. One proposal suggests that when a call for a person with known mental health issues comes in, only a team specifically trained to interact with persons

eight cases of mentally ill women who were killed by the police when their families or neighbors called to obtain assistance for the women.⁹⁵ The police “assisted” them by killing them.

2. *Black Women Can Be Killed Just Because*

It is not just mentally ill Black women who are killed by the police. Grandmothers and granddaughters are killed.⁹⁶ Black babies and fetuses are put at risk.⁹⁷ Black women who have friends who talk too loudly are killed.⁹⁸ Black women who violate gender norms are killed.⁹⁹ Black women who drive are killed.¹⁰⁰ Law enforcement can erase the life of a Black woman with ease and very little accountability. The stories of Miriam Carey and Mya Hall are perfect examples of women who law enforcement tried to erase.¹⁰¹ Carey’s case is instructive because it did receive media coverage of a sort. Carey’s death in Washington, D.C. in 2013 first was reported as a

with mental health problems be sent out. This would help alleviate the situation where a police officer with heavy weaponry responds to a call for a health crisis and shoots the individual whom they have come to help. Law enforcement can be found deficient in employing skills that de-escalate conflict as opposed to escalating the encounter so that it invariably results in violence. This can be particularly problematic for Black women as the police are more likely to see them as aggressive, violent, and defying authority, thus triggering an escalated response from law enforcement.

95. See Ritchie et al., *supra* note 9, at 18–19. The project report was published in July 2015 and therefore does not include the name of Deborah Danner, a Black woman with a history of mental health issues who predicted that she could die at the hands of the police, and indeed she did.

96. *Id.* at 22 (detailing the death of seven-year-old Aiyana Stanley-Jones).

97. Miriam Carey’s infant was in the back seat when police shot up the car. See *infra* note 104. Charleena Lyles was three months pregnant when the police shot and killed her in Seattle, Washington. Lyles called the police for help. Katie Mettler & Mark Berman, *Seattle police fatally shoot pregnant woman who they say confronted officers with a knife*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/19/seattle-police-fatally-shoot-Black-mother-of-four-who-confronted-officers-with-a-knife/?utm_term=.917d0cc03ddc [<http://perma.cc/DH47-J9MR>]. In 2017, Alteria Woods, four months pregnant, was shot and killed in Florida by a SWAT team attempting a raid on her boyfriend’s home. Luli Ortiz, *Pregnant woman used as a shield from bullets by father, killed in Gifford SWAT raid*, CBS 12 (June 4, 2017), <http://cbs12.com/news/local/pregnant-woman-used-as-shield-by-boyfriend-killed-in-gifford-swat-raid> [<http://perma.cc/9AYV-H6WJ>].

98. Ritchie et al., *supra* note 9, at 22 (detailing the death of Rekia Boyd in Houston, Texas).

99. *Id.* at 27 (detailing the death of Nizah Morris, a transgender woman who died after being beat up by the police in Philadelphia, Pennsylvania).

100. *Id.* at 10–13. When I originally reviewed the report, there were eight women featured in this section of the publication, a number equal to those with mental health issues. An updated version of the report has ten women listed under driving while Black. The mental health section was reorganized to six, with Eleanor Bumpurs and one other woman moved to a different section. Danner’s death is still not included in the report.

101. *Id.* at 12.

breaking news story: news outlets reported that there had been a car chase after she tried to ram through a White House barricade, which ended in a fatal shooting.¹⁰² The United States Attorney's Office for the District of Columbia conducted an investigation, and issued a statement concluding federal prosecutors found "insufficient evidence to prove beyond a reasonable doubt that these officers used excessive force under the circumstances known to them at the time or that they acted with the requisite criminal intent."¹⁰³ The investigation into her death was closed. The statement was less than three pages long.

A *Washington Post* investigative report about the death of Carey raised more questions than were answered by the official Justice Department investigation. The reporter noted that the public version of the event did not match either the available video camera footage or the actual facts as they were reported by witnesses, none of which was released to the public.¹⁰⁴ For example, the battering incident was actually Ms. Carey trying to exit an area she mistakenly entered; as she made a U-turn to exit the area, a plainclothed individual tried to pull a fence in front of her.¹⁰⁵ The high speed chase was actually not high speed.¹⁰⁶ According to the reporter, who reviewed departmental policies, the officers who fired upon her fired in violation of policy prohibiting firing into moving vehicles.¹⁰⁷ Although Capitol Police denied they saw the child in the back seat, the reporter concluded that the police had at least three opportunities to see the baby.¹⁰⁸

According to #SayHerName, Mya Hall was another Black woman killed while driving.¹⁰⁹ A few days before Freddie Gray's death, Hall made a wrong turn into a National Security Agency (NSA) parking facility. It appears that when she became aware of the error, she attempted to get out of the area, but security had already moved

102. See *Police shoot, kill driver after Capitol Hill chase*, CLEVELAND.COM (Oct. 3, 2013, 6:18 PM), http://www.cleveland.com/nation/index.ssf/2013/10/police_suspect_killed_in_capit.html [<http://perma.cc/8BUS-NSS4>].

103. Press Release, Department of Justice, U.S. Attorney's Office Concludes Investigation Into The Death Of Miriam Carey No Charges To Be Filed In Shooting Near U.S. Capitol (July 10, 2014), <https://www.justice.gov/usao-dc/pr/us-attorney-s-office-concludes-investigation-death-miriam-carey-no-charges-be-filed> [<http://perma.cc/QX6B-N7NZ>].

104. David Montgomery, *How Miriam Carey's U-turn at a White House checkpoint led to her death*, WASH. POST (Nov. 26, 2014), http://www.washingtonpost.com/sf/style/2014/11/26/how-miriam-careys-u-turn-at-a-white-house-checkpoint-led-to-her-death/?utm_term=.197a30d01953 [<http://perma.cc/KF9F-3NY7>].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Ritchie et al., *supra* note 9, at 10.

to prevent that. Hall's car crashed into a security fence, and NSA officers fired into her vehicle, killing her. It was later reported that Hall was allegedly driving a stolen vehicle, and the media initially reported that two men in the car were "dressed as women."¹¹⁰ Hall was a transgender woman, but, NSA security would not have known either fact at the time they made the decision to fire deadly rounds into her car. The killing of Carey and Hall seem even more unusual when contrasted with other security breaches that occurred in and around the White House. Between 1980 and 2009, White House security had been breached ninety-one times.¹¹¹ Since that time, there have been multiple additional breaches.¹¹² To find a death associated with a White House breach, one must go back to 1994, and in that instance the intruder died when the plane he tried to land crashed on the White House lawn.¹¹³ Several intruders have been shot and wounded, but all survived. Between 1995 and 2017 intruders to the White House and its environs have been armed with guns¹¹⁴ and explosives.¹¹⁵ Yet *none* of them were killed. Even the man who fired rifle rounds into the White House and fled with hundreds of rounds of ammunition was apprehended without a death.¹¹⁶ Miriam Carey was not the beneficiary of such restraint.

110. Peter Hermann et al., *A fatal wrong turn suspected at NSA*, WASH. POST (Mar. 30, 2015), https://www.washingtonpost.com/local/crime/officials-respond-to-incident-at-nsa-on-fort-meade-campus/2015/03/30/08bdf56-d6e1-11e4-ba28-f2a685dc7f89_story.html?utm_term=.0746ce95bc93 [http://perma.cc/5HJ8-5WTX].

111. Soraya Roberts, *Secret Service: White House breached 91 times in past 30 years*, N.Y. DAILY NEWS (Dec. 7, 2009), <http://www.nydailynews.com/news/politics/secret-service-White-house-security-breached-91-times-30-years-article-1.435055> [http://perma.cc/W9LU-CL7T].

112. Emily Shapiro & David Caplan, *Man Shot by Secret Service Remains in Critical Condition*, ABC NEWS (May 22, 2016), <http://abcnews.go.com/US/White-house-lockdown-report-shooting-nearby/story?id=39263422> [http://perma.cc/5AJM-W3FH]; *Long List of Breaches and Scandals for Secret Service Under Obama*, NBC NEWS (Oct. 1, 2014), <http://www.nbcnews.com/news/us-news/long-list-breaches-scandals-secret-service-under-obama-n215751> [http://perma.cc/84D6-2QB5].

113. Maureen Dowd, *Crash At The White House: The Overview; Unimpeded Intruder Crashes Plane Into White House*, N.Y. TIMES (Sept. 13, 1994), <http://www.nytimes.com/1994/09/13/us/crash-white-house-overview-unimpeded-intruder-crashes-plane-into-white-house.html?pagewanted=all> [http://perma.cc/Q7W3-RV6U].

114. Carol D. Leonnig, *Secret Service fumbles response after gunman hit White House residence in 2011*, WASH. POST (Sept. 27, 2014), https://www.washingtonpost.com/politics/secret-service-stumbled-after-gunman-hit-White-house-residence-in-2011/2014/09/27/d176b6ac-442a-11e4-b437-1a7368204804_story.html?utm_term=.a6e935b139fc [http://perma.cc/JWN6-XC4L].

115. Jaime Holguin, *D.C. Standoff With Tractor Man Drags On*, CBS NEWS (Mar. 19, 2003), <http://www.cbsnews.com/news/dc-standoff-with-tractor-man-drags-on> [http://perma.cc/F2WP-CZFY].

116. David Jackson & Donna Leinwand Leger, *White House shooting suspect called Obama 'the anti-Christ,'* USA TODAY (Nov. 17, 2011), <http://usatoday30.usatoday.com/news/washington/story/2011-11-17/obama-assassination-attempt/51271096/1> [http://perma.cc/5WYF-UKB6].

But Carey and Hall, neither of whom was a suspected terrorist, neither of whom were armed, neither of whom had actually threatened national security, but both of their interactions starting with what was arguably a minor traffic offense, were shot and killed. Those facts alone should have propelled both killings to major public attention, but they did not.¹¹⁷

The true facts of Ms. Carey's death will probably never see the light of day. This is routine for the deaths of Black women at the hands of the police. Their deaths are not made clear, if at all, until the civil law suits, or by reading through the Justice Department's investigations of excessive violence by law enforcement agencies or in international reports.¹¹⁸ For example, the tragic end of the life of a Black woman in Chicago would have been lost if not reported to the U.N. The Chicago police suspected the woman was swallowing contraband and feared not being able to recover it. Their solution was to choke her to force her to spit up the contraband. They strangled her to death.¹¹⁹ Or, the woman whom the police had executed because she filed a police brutality complaint against them.¹²⁰ The true extent of how often the police kill Black women is difficult to measure and is almost always hidden.

B. Black Women Injured by Overaggressive Policing

1. Police Violence Against Adult Black Women

Not only are Black women killed by the police, but they are also arrested at a disproportionate rate compared to White women. By

117. Montgomery suggested in his article that Carey's killing occurred approximately one week after the Navy Yard shooting and that officers might have been afraid that Carey was a suicide bomber. Of course, in a time of heightened security and paranoia about safety, it would not be unrealistic for law enforcement to be concerned about terrorism. Nonetheless, security concerns do not provide justifiable circumstances for killing a person whose vehicle could have been incapacitated. Again, one can contrast the handling of the "suicide bomber" theory with the White farmer who claimed to have explosives. He was penned in an area and given time for a peaceful resolution to the standoff, all the while the police suspecting he might have had a tractor full of explosives. See Holguin, *supra* note 115; Montgomery, *supra* note 104.

118. But at least her family may learn the truth during the discovery phase of the civil suit filed against the Capitol Police and the Secret Service.

119. U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES (2007), <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN15.pdf> [<http://perma.cc/V3X7-D5VM>] [hereinafter IN THE SHADOWS OF THE WAR ON TERROR].

120. *Len Davis' arrest and conviction, as told by the Times-Picayune reporters*, TIMES-PICAYUNE (Dec. 4, 2009, 2:00 AM), http://www.nola.com/crime/index.ssf/2009/12/len_davis_arrest_and_convictio.html [<http://perma.cc/5D33-GAZL>].

2009, the rates of arrest for Black women and men began to decline.¹²¹ Today, the rate of arrest for Black women is 2.8 times the arrest rate of White women, down from six times the rate of arrest in 2000.¹²² Though this does reflect a decrease in the rate of arrest, it is obviously still disproportionate to the percentage of Black women in the general population.¹²³ Over representation of Black women can be attributed to the war on drugs policies, broken windows strategies of policing, and aggressive over policing of Black communities. There is no centralized data that shows the impact of policing on Black women, but localized searches can help. An extreme example of policing that is racially based and targets Black women is occurring in San Francisco, California. Black women in San Francisco make up 5.8 percent of the population but they constitute 45.5 percent of women arrested.¹²⁴ Though California is known for high rates of arrest for Black women, San Francisco's rate is four times the rate of the state overall.¹²⁵ Moreover, the huge disparity in the arrest rate for Black women has been empirically demonstrated in four separate reports submitted to the city, with the earliest one published in 2002, according to Center on Juvenile and Criminal Justice.¹²⁶ City officials acknowledged the disparity, yet no official city action had been taken to rectify the situation. For at least thirteen years the police were allowed to harass and arrest these women.¹²⁷ The mayor of San Francisco was eventually forced to act in 2016 when an officer killed an unarmed Black woman named Jessica Williams.¹²⁸ It was the third killing of an unarmed

121. Marc Mauer, *The Changing Racial Dynamics of Women's Incarceration*, THE SENTENCING PROJECT (Feb. 27, 2013), <http://www.sentencingproject.org/publications/the-changing-racial-dynamics-of-womens-incarceration> [<http://perma.cc/ZY54-E2TY>].

122. *Id.*

123. It may be too early to celebrate the decline in arrest rates for Black women and men. Attorney General Jeff Sessions has indicated he intends to return to the "War on Drugs," which had a major impact on the mass incarceration of Black people and the dramatic rise in rates of imprisonment for Black women. Joseph Tanfani & Evan Halper, *Session restores tough drug war policies that trigger mandatory minimum sentences*, L.A. TIMES (May 12, 2017), <http://www.latimes.com/politics/la-na-politics-sessions-drugwar-20170511-story.html> [<http://perma.cc/NG8D-N42N>].

124. MICHAEL MALES, CTR. ON JUV. & CRIM. JUST., SAN FRANCISCO'S DISPROPORTIONATE ARREST OF AFRICAN AMERICAN WOMEN PERSISTS 1 (2015), http://www.cjcj.org/uploads/cjcj/documents/disproportionate_arrests_in_san_francisco.pdf [<https://perma.cc/HP47-JCJK>].

125. *Id.* at 2.

126. *Id.* at 1.

127. The CJCJ report data shows that the rate of arrest exceeded California's even though the overall rate of Black women offending was at its lowest historical levels. *Id.* at 3.

128. Ms. Williams was suspected of driving a stolen vehicle. She crashed the car and the police shot her to death as they were removing her from the wreck. Thomas Fuller &

person (one Black male, and one Latino male) in San Francisco in a two month period.¹²⁹

Although empirical data is not available to validate the experiences of Black women at the hands of overly aggressive officers, social media allows us to get some rare insights into their interactions with the police.¹³⁰ One of the most poignant examples we have of the perils Black women face when interacting with the police played out both on cell phone video posted to the internet and over the audio of a 911 call for a traffic offense in Houston, Texas.¹³¹ In light of the heightened media attention to police violence against Black people, the young woman became frightened when she realized a White police officer was trying to pull her over for a traffic infraction. She complied with the officer's indication to pull over, but then called 911, to advise the police dispatcher that she was frightened and to ask for an additional officer to come to the scene. Her fear of the police officer turned out to be well-founded. While she was on the phone with 911, a passing citizen caught video of the police officer violently throwing her to the ground and arresting her for the traffic infraction.¹³²

The second example also comes from Texas, where a Black woman named Jacqueline Craig in Fort Worth, Texas, called the police to complain that her seven-year-old child was choked by a neighbor (White) after the boy dropped some litter on the neighbor's lawn.¹³³ The police officer arrived, talked with the mother and then went to speak with the White neighbor. The officer returned to the

Timothy Williams, *San Francisco Forces Out Police Chief After Officer Kills Black Woman*, N.Y. TIMES (May 19, 2016), <https://www.nytimes.com/2016/05/20/us/san-francisco-forces-out-police-chief-after-officer-kills-black-woman.html> [http://perma.cc/W9X3-GL7N].

129. *Id.*

130. Ironically, not even Black women who are law enforcement are protected from aggressive over policing. A Black Assistant State Attorney in Florida was recently pulled over by a police officer who ran her plates. Once he discovered who she was, he nervously tried to explain the stop. *Fla. state attorney pulled over by police*, WASH. POST (July 12, 2017), https://www.washingtonpost.com/video/national/fla-state-attorney-pulled-over-by-police/2017/07/12/7da1f192-6752-11e7-94ab-5b1f0ff459df_video.html [http://perma.cc/HU3D-GR6G].

131. Amy B. Wang, *A Black woman called 911 because she was afraid of a police officer. A violent arrest followed.*, WASH. POST (Aug. 5, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/05/social-worker-calls-911-because-shes-afraid-of-a-police-officer-he-then-violently-arrests-her/?utm_term=.23adc925673f [http://perma.cc/4P4Y-UTGJ].

132. *Id.* Video of the incident is embedded in the story.

133. Shaun King, *KING: Black family brutalized by Texas cop for reporting assault*, N.Y. DAILY NEWS (Dec. 22, 2016), <http://www.nydailynews.com/news/national/king-Black-family-brutalized-texas-reporting-assault-article-1.2920020> [http://perma.cc/98MP-FAEX].

mother and criticized her child-rearing practices.¹³⁴ Ms. Craig, annoyed that the officer chose to question her child-rearing tactics as opposed to investigating the assault on her child, verbally challenged the officer, contested that even if the child littered it did not give the neighbor the right to touch her child.¹³⁵ The officer immediately escalated the confrontation with the Craigs. Brea Hymond, Craig's nineteen-year-old daughter, tried to mediate the escalation by stepping between her mother and the now enraged officer. At that point the officer pulled out his Taser and wrestled both Black women to the ground.¹³⁶ Craig was charged with resisting arrest and for outstanding traffic warrants; Hymond was charged with resisting arrest and interfering with public duty.¹³⁷ Again, a person not involved in the conflict recorded the event and uploaded it to social media.¹³⁸ When the incident went viral, some mainstream news media outlets picked up the story. The police officer in question was wearing a body cam, however the Fort Worth police did not release the officer's footage.¹³⁹

Despite the fact that many aggressive police actions are taken against Black women, the reports rarely specifically identify the victims of bad police behavior as Black women. Over the past several years the Department of Justice has investigated numerous police departments for using excessive force against Black communities.¹⁴⁰ After the death of Freddie Gray in Baltimore and the unrest that followed, the DOJ led by Attorney General Loretta E. Lynch, under the Obama presidency, began to investigate the Baltimore police. The final report identified a pattern and practice of police violence and dereliction of duty.¹⁴¹ For example, the DOJ found that

134. *Id.*

135. *Id.*

136. Corky Siemaszko, *Texas Police Probing Arrest of Black Woman by White Officer After They Called Cops*, NBC NEWS (Dec. 22, 2016), <https://nbcnews.com/news/us-news/texas-police-probing-arrest-Black-women-White-officer-after-they-n699201> [http://perma.cc/P3A6-UEXB].

137. *Id.*

138. *Id.* The Executive Director of the Texas ACLU pointed out the inability of a Black woman to get assistance from the police after a family member is choked threatens public safety because such experiences would dissuade that woman from ever calling the police again. *Id.*

139. The representative claimed that state law limited their ability to release the body cam footage because an internal investigation was started. *Id.*

140. At one point, the Justice Department had seventeen open investigations against various police departments. Sarah Moughty, *17 Justice Dept. Investigations Into Police Departments Nationwide*, WHRO (Sept. 20, 2011), <http://pbs.org/wgbh/frontline/article/17-justice-dept-investigations-into-police-departments-nationwide> [http://perma.cc/X94C-A5U2].

141. CIVIL RIGHTS DIV., U.S. DEPT OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016).

the police conducted over sixty strip searches in violation of people's rights.¹⁴² When African American or Black men were the recipients of illegal police conduct, they were specifically mentioned as African American or Black.¹⁴³ Female victims were rarely identified as African American or Black, unless the police said something specific such as "Black b***h."¹⁴⁴ Yet, Baltimore is a city that is sixty-three percent African American or Black.¹⁴⁵ It is improbable that many of the incidents of abuse towards women were not incidents involving Black women. Here again, the use of social media becomes important for locating Black women within the phenomenon of police violence in Baltimore. An example from the DOJ report that was widely covered in the media involved a traffic stop where a woman was pulled over by the Baltimore police for a broken headlight.¹⁴⁶ The woman was strip searched on the street, and the police went so far as to perform an anal cavity search right out in public. Neither the DOJ report nor major media, such as the *Washington Post*, mentioned that the woman was Black. However, a small blog dedicated to police brutality issues identified the woman as Black in its headline.¹⁴⁷ Without the blog she would be yet another Black woman sitting at the intersection of race, gender, and police brutality, who would have remained invisible.

Similar incidents can be found in other DOJ reports on police violence.¹⁴⁸ As usual, Chicago provides a decent example. The Chicago police department has been accused of police brutality routinely since as early as 1951.¹⁴⁹ The department has been mentioned in

142. *Id.* at 32.

143. See *Baltimore police conducted more than 60 illegal strip searches, some in public—DOJ*, RUSSIA TODAY (Aug. 12, 2016), <https://rt.com/usa/355602-baltimore-police-illegal-strip-searches> [<http://perma.cc/EJQ7-YJF4>]; Lynh Bui & Tom Jackman, *Strip searches, 'lock up all the Black hoodies': Excerpts from Justice Dept. report on Baltimore PD*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/08/10/excerpts-from-the-justice-departments-report-on-practices-of-the-baltimore-police-department/?utm_term=.58d514ad5af5 [<http://perma.cc/G9G9-R743>].

144. CIVIL RIGHTS DIV., *supra* note 141, at 70.

145. *Id.* at 12.

146. *Id.* at 32.

147. Yan Big Davis, *Cop Strip-Search Black Female Driver In Public Over Broken Tail Light*, BLACKMATTERSUS (Aug. 13, 2016), <https://Blackmattersus.com/13627-cop-strip-search-Black-female-driver-in-public-over-broken-taillight> [<http://perma.cc/ZGM4-AJJA>].

148. U.S. DEP'T OF JUST., CIV. RTS. DIV. & U.S. ATT'Y'S OFF., N.D. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017).

149. *UN Committee Against Torture Questions US About Burge and Other Police Abuses*, CHI. INDYMEDIA (May 8, 2006), <http://chicago.indymedia.org/archive/newswire/display/72022/index.php> [<http://perma.cc/NK3N-A4HR>] [hereinafter *UN Committee Against Torture Questions US*]; *The People: 360 People were shot by Chicago police in the last 5 years*, WE CHARGE GENOCIDE UN SHADOW REPORT, <http://report.wechargegenocide.org/people.html> [<http://perma.cc/473Y-ZQ4U>] [hereinafter *The People: 360 People were shot by Chicago police*]; IN THE SHADOWS OF THE WAR ON TERROR, *supra* note 119.

several shadow reports to the U.N. Committee on Torture, the U.N. Committee on the Convention to Eliminate Racial Discrimination, and the Committee on the Convention for Civil and Political Rights.¹⁵⁰ In response to the death of Laquan McDonald, a Black male, in 2015, The DOJ opened a new investigation into the pattern and practice of the Chicago police.¹⁵¹ The DOJ found rampant police misconduct.¹⁵² But in the report, created by a Justice Department run by a Black man as U.S. Attorney General, very few references are made about the race of the women injured by the Chicago police.¹⁵³ The report for example, includes a reference to an incident where the police tasered a pregnant woman multiple times during a stop for a traffic infraction.¹⁵⁴ This incident was used as an example of excessive and inappropriate use of force.¹⁵⁵ Just as in other DOJ reports, specific references to Black women or girls were oddly missing, but a Google search turns up video of a Black pregnant woman named Tiffany Rent being assisted on her way to the hospital for medical treatment after being tasered by the Chicago police.¹⁵⁶ Yet another Black woman whose injuries would have been rendered invisible.

It is not clear why the police are so violent towards Black women, as their violence towards Black women has not been comprehensively studied. However, research on the violent interactions between the police and Black men may provide some hints to what drives the police towards violence. An interesting study on the use of violence by the police examined the intersection of implicit bias, stereotype threat, and threat to masculinity.¹⁵⁷ The study concludes that the triggering of one or more of these states can cause officers, who otherwise consider themselves aware and free from bias, to use excessive force against Black males.¹⁵⁸ Implicit bias is being discussed more frequently recently, to help explain why individuals who do not exhibit overt racial bias may still engage in anti-Black

150. *UN Committee Against Torture Questions US*, *supra* note 149; *The People: 360 People were shot by Chicago police*, *supra* note 149; *IN THE SHADOWS OF THE WAR ON TERROR*, *supra* note 119, at 7.

151. Kim Bellware, *Department of Justice to Investigate Chicago Police: Report*, HUFFINGTON POST (Dec. 6, 2015, 5:37 PM), http://www.huffingtonpost.com/entry/doj-investigation-chicago-police_us_5664a222e4b08e945fefdddf [<http://perma.cc/DU28-3GNH>].

152. U.S. DEPT OF JUST., *supra* note 148, at 5.

153. *See id.* at 32, 36, 37, 45, 67, 76, and 79.

154. *Id.* at 151.

155. *Id.*

156. The LeakSource, *Chicago Police Taser Pregnant Woman*, YOUTUBE (June 6, 2012), https://www.youtube.com/watch?v=D-f_8_ifHmU [<http://perma.cc/DL98-CF3Z>].

157. L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2963 (2015).

158. *Id.* at 2964.

behavior.¹⁵⁹ Professor Song Richardson identifies not only the most commonly understood form of implicit bias, but also a concept called implicit dehumanization.¹⁶⁰ These two implicit biases are then partnered with principle known as “White favoritism.”¹⁶¹ Together the three can lead police to associate Black males with criminality, while at the same time associating Whites with innocent conduct.¹⁶² It is significant that the implicit dehumanization allows police officers to associate Black persons closer to apes than humans.¹⁶³ That association then causes them to engage in more violent behavior to the Black male.¹⁶⁴ Social scientists have found that such implicit dehumanization is a factor in the excessive use of violence against Black juveniles.¹⁶⁵ Professor Song Richardson’s work and most of the sources she cites refer to police reactions to Black males, which is a shame because many of the theories also seem applicable to police interaction with Black females.¹⁶⁶ The social science theories help support the argument that the historical stereotypes of Black women need to be continuously examined to see where law enforcement policy and behavior continues to be influenced by those stereotypes.

The other two factors were stereotype threat and threat to masculinity.¹⁶⁷ In what seems to be a non-intuitive twist, if a police

159. The concept “implicit bias” has now become part of common parlance. In a search for a quick explanation to persistent racial profiling and police violence, implicit bias has become the darling of the moment. Ediberto Roman, *Implicit Bias at the root of Brutality Epidemic*, HUFFINGTON POST (June 10, 2015, 3:58 PM), http://www.huffingtonpost.com/ediberto-roman/implicit-bias-at-the-root_b_7549292.html [<http://perma.cc/HA7H-99W6>]; John Michillo, *How Science is Helping America Tackle Police Violence*, WIRED (Jan. 21, 2015, 6:45 AM), <https://www.wired.com/2015/01/implicit-bias-police-racism-science> [<http://perma.cc/AT4T-95GN>]; Kia Makarechi, *What the Data Really Says About Police and Bias*, VANITY FAIR (July 14, 2016, 3:09 PM), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias> [<http://perma.cc/Y7QH-5DYK>].

160. Richardson states that implicit dehumanization occurs when individuals unconsciously associate Blacks with apes. Richardson, *supra* note 157, at 2963.

161. Richardson calls White favoritism “a sister concept to anti-Black racial bias.” *Id.* at 2964. She cites the work of Robert J. Smith et al., *Bias In the Shadows of Criminal Law: The Problem of Implicit White Favoritism*, 66 ALA. L. REV. 871 (2015). According to Smith, White favoritism is “the automatic association of positive stereotypes and attitudes with members of a favored group, leading to a preferential treatment for persons in that group.” *Id.* at 874–75.

162. Richardson, *supra* note 157, at 2965.

163. *Id.* at 2964. See *supra* note 37 and accompanying text.

164. *Id.*

165. *Id.* at 2963–64 (citing Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008), to assert “[t]he more closely police officers unconsciously associated Black youth with apes, the more likely they were to use violence against the children.”).

166. *Id.* at 2965.

167. *Id.* at 2966.

officer believes a Black person thinks the officer is racist, it actually causes the officer to use more violence.¹⁶⁸ In a sense, the officer's belief that his legitimacy is being questioned triggers the use of violence.¹⁶⁹ On a more intuitive level, when the officer believes his masculinity is being questioned, he will also use more force.¹⁷⁰ It is clear why the police would believe Black men challenge their masculinity, since the violence is primarily a male phenomenon and often triggered by concepts of competing masculinities.¹⁷¹ But, is it possible that Black women also produce a threat to masculinity? Of course. The studies do not discuss this aspect of police violence against Black women,¹⁷² however, it is possible to envision a scenario where Black women would indeed create a threat to a police officer's masculinity. One of the popular stereotypes about Black women that is repeated in media, in advertising, and in development of both social welfare policy as well as criminal justice policy, is the version of the overbearing, demeaning Black woman, who emasculates men.¹⁷³ When police officers see Black women who may not verbally submit readily to them, it could present a masculinity threat to them, thus triggering excessive use of force against the women. A re-read of any of the examples of police interaction with Black women cited above,¹⁷⁴ and in the instances with juveniles cited below,¹⁷⁵ it is clear that the police were demonstrating their masculinity, and their control over these Black female bodies. A focused study on bias, threat, and violence against Black women would be useful to help provide the empirical data to conform what personal chance videotaping of these incidents "anecdotally" reveals.

168. Stereotype threat is part of what Richardson calls "self-threat," which involves a person's perception of themselves and how that impact his or her behavior. Richardson, *supra* note 157, at 2967 (citing to research by Atiba Goff, Richardson concluding that an officer's fear of being considered racist can lead him to engage in violence).

169. Song Richardson believes this self-threat is tied to the officer's belief in his legitimacy. If people believe he is racist, his legitimacy is being questioned. Therefore he must use force to establish legitimacy. *Id.* at 2968.

170. "Masculinity threat refers to the fear of being perceived as insufficiently masculine." *Id.* at 2970.

171. *Id.*

172. *Id.*

173. Danielle Wright, *Are Controlling Black Men Responsible for the "Angry Black Woman" Stereotype?*, BET (Jan. 19, 2012), <https://www.bet.com/news/national/2012/01/19/are-controlling-black-men-responsible-for-the-angry-black-woman-stereotype.html> [<http://perma.cc/T3QC-H2AR>].

174. *See supra* notes 131–37.

175. Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. TIMES (June 8, 2015), <https://nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html> [<http://perma.cc/XC7N-T5QN>].

2. *Black Girls Are Black Women Too*

The police do not restrict the use of excessive and aggressive force to adult Black women.¹⁷⁶ Law enforcement also arrest and brutalize young Black girls.¹⁷⁷ Statistics on these events are difficult to find, but the use of social media has enabled more recent events to work their way into local and national media.¹⁷⁸ In McKinney, Texas, in the summer of 2015, White officers were filmed answering a call about noise at a pool party.¹⁷⁹ Girls at the party used their cell phones to film the officer's actions.¹⁸⁰ One officer is seen throwing a Black teenage girl, wearing only a bikini, to the ground and places his knee in her back while handcuffing her.¹⁸¹ The same officer pulled out his loaded service revolver and pointed it at the other Black girls who were guests at the party.¹⁸² In the fall of 2016, the D.C. police arrested an eighteen-year-old girl by knocking her to ground and handcuffing her.¹⁸³ Her offense was that she was on the paid side of the fare gate with an open bag of potato chips, and she talked back to them.¹⁸⁴ Also, in the fall of 2016, the police in Hagerstown, Maryland, pepper-sprayed and handcuffed a fifteen-year-old Black girl.¹⁸⁵ The police justified it by saying she was uncooperative, although video prior to the escalating police conduct shows her cooperating with the fireman on the scene.¹⁸⁶ The child's offense was that she fell off her bike and hit a car.¹⁸⁷ Neither she nor

176. Martine Powers, *Transit cops criticized for use of force in arrest of girl over lollipop, potato chips*, MIAMI HERALD (Oct. 20, 2016, 5:30 PM), <http://www.miamiherald.com/news/nation-world/national/article109485567.html> [<http://perma.cc/AW6L-2N6D>].

177. *Id.*

178. German Lopez, *Police officer who slammed Black girl to the ground at McKinney, Texas, pool party resigns*, VOX (June 9, 2015, 9:15 PM), <https://www.vox.com/2015/6/7/8744011/mckinney-texas-police-officer> [<http://perma.cc/9343-NHCD>] (describing a viral event involving Black teenagers and police).

179. Cole-Frowe & Fausset, *supra* note 175 (video embedded in article). As it turns out, White neighbors called the police because the Black girls, who were guests of a Black resident, and therefore legitimately entitled to use the pool, were "too loud." The officer was suspended and later resigned. There is no indication whether the officer was officially punished. *See* Lopez, *supra* note 178.

180. *Id.*

181. *Id.*

182. *Id.*

183. Powers, *supra* note 176.

184. *Id.*

185. Julie Jacobo, *Video Shows 15-Year-Old Girl Being Pepper-Sprayed by Police*, ABC NEWS (Sept. 22, 2016, 3:16 PM), <http://abcnews.go.com/US/video-shows-15-year-%20girl-pepper-sprayed-police/story?id=42285044> [<http://perma.cc/533L-Z29X>].

186. *Id.*

187. *Id.*

the driver were injured and she just wanted to continue on her way home so her mother wouldn't worry about her.¹⁸⁸ Or the story out of Brooklyn, New York, where the police actually shoved a teenage Black girl through the plate glass window of a store.¹⁸⁹ In this instance, the original offense seemed to be that the group of girls were talking back to the police.¹⁹⁰ When the officer involved threw one Black girl to the ground and repeatedly slammed her face into the floor, her friend came to help her.¹⁹¹ In response, the police shoved her through the plate glass window.¹⁹² All of these incidents seem to revolve around Black girls talking back to the police or being so-called "loud." Not only do stereotypes about Black female behavior factor in here, but it may also be possible that the girls are triggering masculinity threat or legitimacy threat in the officers.

Another possible factor in the use of police violence against girls may be connected to a recent social science study focused on the issue of whether adults attributed adult characteristics to Black girls.¹⁹³ A review of the literature on adultification of Black boys and girls preceded the analysis of the results of the study.¹⁹⁴ The study built on the work of other social scientists who rooted adultification of Black children to the dehumanizing conditions of Black children during chattel slavery, where children were punished for exhibiting normal childlike behaviors.¹⁹⁵ Though the original research focused on Black boys, Black girls were also studied.¹⁹⁶ One scholar used the term "age compression" to explain the phenomenon of how Black

188. *Id.*

189. Andy Cush, *Brooklyn Cop Throws Teenage Girl Through Restaurant Window*, ANIMAL (Mar. 28, 2014, 9:35 AM), <http://animalnewyork.com/2014/brooklyn-cops-throw-teenage-girl-restaurant-window> [<http://perma.cc/9HYK-T384>].

190. *Id.*

191. *Id.*

192. *Id.*

193. REBECCA EPSTEIN ET AL., GEO. LAW CTR. OF POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD, 4 (0217), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf> [<http://perma.cc/6TET-GDX6>].

194. Two forms of adultification have been recognized by scholars. One is based on the child's socialization process and the other based on cultural stereotypes of the child. The first form is "a process of socialization, in which children function at a more mature developmental stage because of situational context and necessity, especially in low-resource community environments." This example would probably fit an instance, where a child might have to assume care of younger siblings because of a parent's alcohol or drug addiction. The second form of adultification is "[a] social or cultural stereotype that is based on how adults perceive children 'in the absence of knowledge of children's behavior and verbalizations.'" *Id.*

195. *Id.*

196. *Id.*

girls are viewed.¹⁹⁷ She stated: “Black girls are likened more to adults than to children and are treated as if they are willfully engaging in behaviors typically expected of Black women.”¹⁹⁸ She concluded that the compression “renders Black girlhood interchangeable with Black womanhood.”¹⁹⁹ The results of the new study were terrifying. The study participants viewed Black girls as more adult than White girls.²⁰⁰ Not only were Black girls perceived to be more adult but that perception reached all the way to Black girls as young as five!²⁰¹ Study participants’ responses identified the following beliefs: Black girls needed less protection and nurturing; Black girls were perceived to know more about adult topics; and are more knowledgeable about sex.²⁰² The authors identified the potential implications raised by the study for Black girls in the educational context and in the juvenile justice context.²⁰³ The incidents involving the police and Black girls seem to comport with the findings of the study, even on the perceptions about sexual knowledge.

A disturbing story arose in the District of Columbia in 2015.²⁰⁴ The Metropolitan Police Department was forced to acknowledge that they arrested an eleven-year-old Black girl when she came to report she had been raped.²⁰⁵ Even though the girl had signs of sexual trauma, the police charged her with filing a false police report.²⁰⁶

197. *Id.*

198. EPSTEIN ET AL., *supra* note 193, at 4.

199. *Id.* (citing Dr. Monique Harris). Another social scientist found that Black girls who are loud could be perceived as a threat and that interpretation of how Black girls speak could be associated with the stereotype of Black women as aggressive and dominating. *Id.* at 5 (citing Edward W. Morris).

200. *Id.* at 1.

201. *Id.* at 8.

202. *Id.* at 1. Professor Monique Morris makes the connection between adultification and culturally rooted stereotypes of Black women’s sexuality, again growing out of the slave experience: “[I]n the public’s collective consciousness, latent ideas about Black females as hypersexual, conniving, loud, and sassy predominate However, age compression renders Black *girls* just as vulnerable to these asperive representations.” EPSTEIN ET AL., *supra* note 193, at 5.

203. Black girls were 2.7 times more likely to be referred to juvenile justice than White girls; less likely to have their cases diverted; and more likely than White females to be detained. *Id.* at 12.

204. Tom Boggioni, *DC police admit botching 11-year-old girl’s rape case, arresting her instead of her attacker*, RAWSTORY (Mar. 13, 2015, 2:29 PM), <http://rawstory.com/2015/03/dc-police-admit-botching-11-year-old-girls-rape-case-arresting-her-instead-of-her-attackers> [<http://perma.cc/MJM3-AQAR>].

205. The incident became public in 2015 when the girl, now a teenager came forward to tell her story. *Id.*

206. The girl came to the police with her parents. A rape kit tested positive and the police did nothing. Over the next several months the girl was raped twice more, the third and last time by the same initial attacker. MPD spoke with the girl’s attackers who was 22. The attacker claimed the girl told him she was 16 and sex was consensual. The police

This is very much akin to what the DOJ found in Baltimore when adult women complained of sexual assault.²⁰⁷ An entire separate paper could be written on what happens to Black girls compared to White girls when they actually enter the juvenile justice system or are formally sentenced to state custody.²⁰⁸

III. BLACK WOMEN ARE RAPED AND SEXUALLY ASSAULTED BY THE POLICE

A. *Invisible Black Victims*

Invisible is often a word used to describe Black women's presence in society. It can seem over used at times, but "invisible" is just the correct word to use when Black women's efforts to have the state respect their rights to preserve bodily integrity. Historically, as mentioned earlier, Black women did not have the right to bodily integrity.²⁰⁹ They could and were raped with impunity.²¹⁰ The legacy of the lack of legal protection for the autonomy of Black women's bodies is still felt today, and renders them invisible in the sexual assault literature, particularly when the assailant is a police officer.²¹¹ Although Andrea Ritchie called attention to police sexual assaults, it is unlikely the issue would have risen to national attention had it not been for the case of Daniel Holtzclaw, an Oklahoma police officer, convicted in 2016 of raping thirteen women while on duty.²¹² The thirteen rapes took place over a course of six months in 2014.²¹³ Holtzclaw targeted women he believed to be vulnerable.²¹⁴ When they protested his sexual advances, he would warn them that their word would not be believed over his words, the words of a police

then charged the girl, forced her into a plea deal and she was sent to a juvenile facility. Her parents said their daughter's childhood ended at 11. *Id.*

207. Christine Cauterucci, *Baltimore Police Blamed Victims for Sex Assaults, Exploited Sex Workers, According to DOJ*, SLATE (Aug. 10, 2016, 4:51 PM), http://www.slate.com/blogs/xx_factor/2016/08/10/baltimore_police_blamed_victims_for_sexual_assaults_traded_immunity_for.html [<http://perma.cc/BR63-4DEV>].

208. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1527–28 (2012).

209. HIGGINBOTHAM, *supra* note 24, at 1056.

210. *Id.* at 1057.

211. Sarah Larimer, *Disgraced ex-cop Daniel Holtzclaw sentenced to 263 years for on-duty rapes, sexual assaults*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?utm_term=.3197547e90ad [<http://perma.cc/9YXD-Q4ES>].

212. *Id.*

213. Eliot C. McLaughlin et al., *OKC Cop Daniel Holtzclaw sentenced to 263 years in prison*, CNN (Jan. 22, 2016, 12:26 PM), <http://www.cnn.com/2016/01/21/us/oklahoma-city-officer-daniel-holtzclaw-rape-sentencing/index.html> [<http://perma.cc/3T7K-U8G7>].

214. Larimer, *supra* note 211.

officer.²¹⁵ Holtzclaw gambled on the probability that none of the women would report him, but one brave woman did exactly that.²¹⁶ Fortunately, a female detective handled the complaint and a formal investigation was opened.²¹⁷ When it became known that a case against him would go forward, other women victimized by him also came forward with complaints.²¹⁸

The Holtzclaw arrest prompted the Associated Press to conduct an extensive investigation about the phenomenon of police raping women while on duty.²¹⁹ The report itself focused on the frequency of sexual misconduct by police officers, and the failure or unwillingness of law enforcement agencies to report the names of officers who were fired because of sexual misconduct while on the job.²²⁰ The AP report also highlighted the fact that many jurisdictions have no mandatory reporting requirement when a police officer loses his certification for criminal conduct.²²¹ As a result, many offending officers simply go to other jurisdictions and are rehired as law enforcement officers, without those jurisdictions knowing that the officer in question has a prior history of rape and assault.²²² Approximately one year after the AP report, Al-Jazeera also published an article on police sexual misconduct.²²³ The Al-Jazeera piece primarily focused on whether the leadership of various law enforcement agencies were turning a blind eye towards the problem of police rapists remaining within the ranks.²²⁴

Neither the AP nor the Al-Jazeera publications, made any reference to the race of the victims of police sexual misconduct.²²⁵ AP stated they do not publish the names of survivors of sexual assault without permission,²²⁶ and of course, this is the correct policy. The mention of the racial identity of the victims, however, does not jeopardize the actual identity of the survivors. In the year between

215. Jessica Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, BUZZFEED (Sep. 5, 2014, 1:40 PM), https://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city?utm_term=.ywq [http://perma.cc/HN9Z-TAF4].

216. *Id.*

217. *Id.*

218. *Id.*

219. Matt Sedensky & Nomaan Merchant, *Betrayed by the Badge*, ASSOCIATED PRESS INVESTIGATIVE REPORT (Nov. 1, 2015), <http://interactives.ap.org/2015/betrayed-by-the-badge> [http://perma.cc/AQ2Y-88RA].

220. *Id.*

221. *Id.*

222. *Id.*

223. Steven Yoder, *Officers who rape: The police brutality chiefs ignore*, AL JAZEERA AM. (Jan. 19, 2016, 5:30 AM), <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html> [http://perma.cc/4T4X-L3ND].

224. *Id.*

225. *Id.*; Sedensky & Merchant, *supra* note 219.

226. Yoder, *supra* note 223.

the AP story and the Holtzclaw conviction, several of the women who complained against him identified themselves in public, including the woman previously known only as J.L., whose complaint kick-started the prosecution against Holtzclaw.²²⁷ Al-Jazeera did publish her photo.²²⁸ She is clearly a Black woman. The *New York Times*, which covered the story at the end of the trial, was the first to clearly state all thirteen of Holtzclaw's victims were Black.²²⁹ Twelve were adult women and one was a teenage girl.²³⁰ Police throughout the country rape Black women and girls.²³¹ There is no area of the country where women and girls are not raped by the police.²³² As the five news articles mentioned below point out, the identity of these women and girls is often hidden.²³³ Nonetheless, we can recover some racially identifying information. A quick Google search produces multiple hits for the Holtzclaw case and two others as well. A Black woman in Syracuse accused a police officer of raping her in front of her newborn son.²³⁴ The story is accompanied by a photo and her name.²³⁵ Another story out of Texas identifies a Black woman who was sexually assaulted by the police at a gas station because she smelled like "weed."²³⁶ The #SayHerName project also identifies police sexual assault of Black women as a problem.²³⁷ Rather than

227. Larimer, *supra* note 211.

228. Yoder, *supra* note 223.

229. Ben Fenwick & Alan Schwarz, *In Rape Case of Oklahoma Officer, Victims Hope Conviction Will Aid Cause*, N.Y. TIMES (Dec. 11, 2015), <https://www.nytimes.com/2015/12/12/us/daniel-holtzclaw-oklahoma-police-rape-case.html> [http://perma.cc/XN3J-4KGD].

230. Larimer, *supra* note 211.

231. Matthew Spina, *When a Protector Becomes a Predator*, BUFFALO NEWS (Nov. 22, 2015), <http://projets.buffalonews.com/abusing-the-law/index.html> [http://perma.cc/J8NG-E4M9].

232. *Id.*

233. See, e.g., *id.*; Candice Bernd, *Police Departments Ignore Rampant Sexual Assault by Officers*, TRUTHOUT (July 2, 2014), <http://www.truth-out.org/news/item/24677-police-departments-ignore-rampant-sexual-assault-by-officers> [http://perma.cc/9Z5V-VLL3]; Joseph Mayton, *When a Cop Is a Rapist*, THE DAILY BEAST (Mar. 18, 2014), <http://josephmayton.wordpress.com/2014/03/21/when-a-cop-is-a-rapist> [http://perma.cc/M926-SFML]; Paula Mejia, *Why Cops Get Away With Rape*, NEWSWEEK (July 9, 2014), <http://www.newsweek.com/police-sexual-assault-rape-justice-258130> [http://perma.cc/VT94-SDGR]; Joanna Walters, *Chicago to pay \$415,000 to woman who reported police raped her in 2011*, THE GUARDIAN (May 6, 2015), <https://www.theguardian.com/us-news/2015/may/06/chicago-police-rape-victim-lawsuit> [http://perma.cc/P6T4-UEVH].

234. Gerren Gaynor, *Black Woman Says Officer Raped Her In Front Of Newborn Son*, CENTRIC (May 18, 2016 3:30 PM), <http://www.centrictv.com/news-views/centric-news/article/2016/05/18/Black-woman-says-officer-raped-her-in-front-of-newborn-son.html> [http://perma.cc/3CU2-7ARS].

235. *Id.* That woman's name is Maleatra Montanez.

236. Jamie Peck, *Cops raped a Black woman in a gas station parking lot because they 'smelled weed'*, DEATH & TAXES (Aug. 10, 2015), <https://www.deathandtaxesmag.com/259137/cops-raped-a-black-woman-in-a-gas-station-parking-lot-because-they-smelled-weed> [http://perma.cc/MW2W-7JLP].

237. Ritchie et al., *supra* note 9, at 28.

print the names of victims, the report identifies two police officers who were convicted of raping Black women.²³⁸ One was Holtzclaw.²³⁹ The other was a Chicago police officer who raped a nineteen-year-old Black woman.²⁴⁰ In keeping with the argument that Black girls are Black women too, the internet provides numerous stories of police who sexually assault or traffic underage girls.²⁴¹ As juveniles their names should never be in the news, and they were not. Local coverage however, once again can be instructive. In the past three years, for example, three police officers from the District of Columbia have been charged with sexually assaulting and/or prostituting girls.²⁴² All of the girls were Black.²⁴³ The District is one of the jurisdictions that does not report the names of officers who have been decertified for criminal conduct.²⁴⁴ The Chicago police can always be counted on to provide examples of bad police behavior and also sexually abused Black girls.²⁴⁵ The Holtzclaw case is by no means an isolated event.

238. *Id.*

239. *Id.*

240. *Id.*

241. Peter Hermann, *D.C. police officer admits prostituting girls*, WASH. POST (June 20, 2014), https://www.washingtonpost.com/local/crime/plea-hearing-set-for-dc-police-officer-accused-of-running-underage-prostitution-ring/2014/06/19/d7dae1ea-f79e-11e3-8aa9-dad2ec039789_story.html?utm_term=.6678b36d4516 [<http://perma.cc/7GVZ-UG3F>] (providing one example of police trafficking young Black girls).

242. *Id.*

243. *Id.*; *DC Police Officer, Pastor from Md., Charged with Sex Abuse of Teen*, CBS BALTIMORE (Mar. 17, 2015, 7:14 AM), <http://baltimore.cbslocal.com/2015/03/17/dc-police-officer-pastor-from-md-charged-with-sex-abuse-of-teen> [<http://perma.cc/L9BR-DWCW>]; Peter Hermann, *DC police officer charged in child pornography case*, WASH. POST (Dec. 3, 2013), https://www.washingtonpost.com/local/crime/dc-police-officer-charged-in-child-pornography-case/2013/12/03/292449bc-5c3e-11e3-bc56-c6ca94801fac_story.html?utm_term=.cac5cda60a49 [<http://perma.cc/MN65-WQJK>].

244. *A look at some recent cases of sex crimes involving officers*, WTOP (Nov. 1, 2015, 12:11 AM), <http://wtop.com/dc/2015/11/a-look-at-some-recent-cases-of-sex-crimes-involving-officers> [<http://perma.cc/V7CN-LG6C>].

245. One of the girls associated with the cop's ring was a girl named "Mocha." It would not be implausible that she is a Black female. Jason Meisner & Jeremy Gerner, *Chicago Cop Arrested on charges he sex trafficked underage girl*, CHI. TRIBUNE (Nov. 2, 2016, 4:54 PM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-cop-arrested-sex-trafficking-met-20161102-story.html> [<http://perma.cc/S4FA-UG47>]. Police officers in Minnesota, California and Florida have also been involved with trafficking in girls, although no racial data could be obtained from local coverage. See Kendall Allen, *Police Officers Keep Getting Caught In Human Sex Trafficking Stings*, ENTITY (June 16, 2017), <https://www.entitymag.com/cops-arrested-human-sex-trafficking-operation> [<http://perma.cc/6QAP-JXS5>]; James Queally, *LAUSD police officer charged with attempted sex trafficking of a child*, L.A. TIMES (Apr. 27, 2016, 11:27 AM), <http://www.latimes.com/local/lanow/la-me-ln-school-police-officer-sex-trafficking-charge-20160427-story.html> [<http://perma.cc/BN8H-Q6JJ>]; Dan Scanlan, *Former Jacksonville police officer pleads guilty to attempted commercial sex trafficking of a child*, JACKSONVILLE.COM (June 7, 2017, 1:43 PM), <http://jacksonville.com/news/public-safety/2017-06-07/former-jacksonville-police-officer-pleads-guilty-attempted-commercial> [<http://perma.cc/2TUB-5W6S>].

The Cato Institute, frustrated by the inability of citizens to obtain hard data on police officers who are terminated for misconduct, started a project called the National Police Misconduct Reporting Project (NPMRP).²⁴⁶ The project seeks to collect data from reported incidents of police misconduct throughout the United States.²⁴⁷ As part of the project, the institute maintains a database for credible reports of misconduct, as well as a daily feed of reported incidents of misconduct, as they appear in the news.²⁴⁸ To date in 2017, not one week has passed without a report of police misconduct.²⁴⁹ The NPMRP data set was last given a full social science study in 2015 by Dr. Anna Feigenbaum of Bournemouth University, a social scientist from the United Kingdom, who mapped the incidents of violence by state and color coded the types of incidents.²⁵⁰ Using the project's own statistical analysis, sexual offenses were second only to excessive use of force complaints.²⁵¹ Unfortunately, even the NPMRP statistics are not collated by race of the victim.²⁵² One may ask, why does it matter that the women are Black? Shouldn't it be sufficient to say that police rape women? Police rape is heinous no matter who the victim is, however, without a more nuanced way of understanding the context in which police rape, a full understanding of police behavior cannot be achieved. There would be no ability to identify whether only "vulnerable" women were being targeted or whether Black women are disproportionately carrying the brunt of police sexual violence against women. A break down of racial statistics would also provide an opportunity to track prosecutions of officers who rape to determine whether prosecutors are actually holding police accountable for sexual assaults on Black women to the same degree as prosecutions where White women are the survivors. The data is needed.

Both the DOJ's office on Violence Against Women and the International Association of Chiefs of Police (IACP) have the ability to monitor police sexual assaults by police officers while on duty.²⁵³

246. David Packman, *NPMRP 2009 Semi-Annual Police Misconduct Statistics Report*, POLICEMISCONDUCT.NET (Oct. 8, 2009), <https://www.policemisconduct.net/npmrp-2009-semi-annual-police-misconduct-statistics-report> [http://perma.cc/A7JZ-YKX7].

247. *Id.*

248. *Id.*

249. See Jonathan Blanks, *National Police Misconduct Newsfeed Daily Recap 7/12/17*, POLICEMISCONDUCT.NET (July 13, 2017), <https://www.policemisconduct.net/npmrp-2009-semi-annual-police-misconduct-statistics-report> [http://perma.cc/862K-NLXL].

250. Jonathan Blanks, *New Visualization of 2015 NPMRP Data*, POLICEMISCONDUCT.NET (Oct. 24, 2016), <https://policemisconduct.net/new-visualization-of-2015-npmrp-data> [http://perma.cc/L6U4-U7QG].

251. Packman, *supra* note 246.

252. *Id.*

253. INT'L ASS'N OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENF'T: EXEC. GUIDE 9 (2011), <http://www.theiacp.org/portals/0/pdfs/Addressing>

In fact, the DOJ provided a grant to the IACP to study the issue of police sexual assault.²⁵⁴ The grant was awarded in 2009 and a report published 2011, acknowledging sexual assault by police officers was a problem and issuing guidelines for police departments on how to handle complaints of a predator officer.²⁵⁵ The IACP guidelines are not mandatory.²⁵⁶ Even today, not all police agencies are required to provide names of officers accused, or convicted of sexual assault to the police decertification database.²⁵⁷ There have not been any further efforts from the Office on Violence Against Women to follow up on this issue.²⁵⁸

B. Black Women Will Always Be in the Vulnerable Women Category

Even though IACP has no mandatory policies with regard to police officers who sexually assault, some of the language from its 2011 report is interesting. The IACP cites the following factors as reasons why the police may target certain women for sexual exploitation:

Predators select victims based on vulnerabilities and a perceived lack of credibility, and therefore, victimization is often higher among certain populations including: (1) minors; (2) individuals in prostitution and/or the commercial sex industry; (3) individuals under the influence of drugs or alcohol; (4) immigrants and undocumented persons; (5) individuals with limited English proficiency; (6) people with mental illness or developmental challenges; (7) individuals with physical disabilities; and (8) those who have been victimized previously.²⁵⁹

This language tracks the language of feminist literature and can be found in all of the investigative reports about Holtzclaw and other predator police officers.²⁶⁰ In addition to these categories, there should be another that includes individuals under custodial or correctional control. Black women and girls who are incarcerated are also subjected to rape and other forms of sexual assault committed by corrections officers and other staff.²⁶¹ It is certainly true that

SexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf [http://perma.cc/HJ5Z-LRN7] [hereinafter ADDRESSING SEXUAL OFFENSES].

254. *Id.* at 2.

255. *Id.* at 5.

256. *Id.* at 2.

257. *Id.* at 8.

258. *Id.* at 15.

259. ADDRESSING SEXUAL OFFENSES, *supra* note 253, at 13.

260. Testa, *supra* note 215.

261. Flynn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 848 (2007).

many victims, not just of the police but of all predators fit well within those categories. Women who engage in sex work, particularly at the street level, have interactions with the police that can lead to sexual harassment and sexual assault.²⁶² Again, the issue of police sexual abuse of these women has been known for some time.²⁶³ Victimization of these women has come to be accepted as normal.²⁶⁴ As feminists and/or members of anti-violence movements, it should not be tolerable that a class of women because they are poor or drug addicted, or sex workers (and therefore despised) should be permanent victims of violence. This normative acceptance of vulnerable women being targetable is very problematic for Black women.²⁶⁵ All of Holtzclaw's victims were Black but they were not all within the categories listed above.²⁶⁶ That then begs the question: can Black women ever be outside of the vulnerable categories? It doesn't really matter for Black women whether they actually are or are not within the vulnerable categories. What matters is the perception of the predator. All Black women in the eyes of law enforcement are deemed to be within those categories, as Jannie Ligons (J.L.) would discover.²⁶⁷ Jannie Ligons, the woman who came forward to complain about Holtzclaw was none of these.²⁶⁸ She was a grandmother without any criminal history, she was not a prostitute, a drug addict

(providing an estimate that at least 15% of female inmates are sexually assaulted while incarcerated); Josh Guckert, *Female Inmates and Sexual Assault*, JURIST (Sep. 15, 2014, 7:00 PM), <http://www.jurist.org/dataline/2014/09/christina-piecora-female-inmates.php> [<http://perma.cc/NTZ9-DAF6>].

262. SEX WORKERS PROJECT AT URBAN JUSTICE CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY, <https://swp.urbanjustice.org/sites/default/files/RevolvingDoorES.pdf> [<http://perma.cc/CF3S-AQ4Y>]; Jody Raphael & DEBORAH L. SHAPIRO, ISSUELAB, *Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago* (2002).

263. See IN THE SHADOWS OF THE WAR ON TERROR, *supra* note 119, at 23–25; Ethan Brown, *What the DOJ's Report on Baltimore Teaches Us About Cops, Sex Workers, and Corruption*, THE MARSHALL PROJECT (Aug. 16, 2016), <https://www.themarshallproject.org/2016/08/16/what-the-doj-s-report-on-baltimore-teaches-us-about-cops-sex-workers-and-corruption#.y0VcwRXe0> [<http://perma.cc/S9CN-ZSEN>].

264. See IN THE SHADOWS OF THE WAR ON TERROR, *supra* note 119, at 47 (“Even when violence is reported, these crimes usually go unpunished because violence against sex workers is tacitly accepted.”).

265. See Fenwick & Schwarz, *supra* note 229.

266. See *id.*

267. See Andrea Ritchie, *As We #SayHerName, 7 Policy Paths to Stop Police Violence Against Black Girls and Women*, COLORLINES (May 19, 2016, 2:38 PM), <https://www.colorlines.com/articles/we-sayhername-7-policy-paths-stop-police-violence-against-black-girls-and-women> [<http://perma.cc/SM4Q-4ZVH>].

268. Fenwick & Schwarz, *supra* note 229 (for difference to previous victims); Meg Wagner, *Grandma sexually assaulted by ex-cop Daniel Holtzclaw speaks*, N.Y. DAILY NEWS (Dec. 11, 2015, 2:00 PM), <http://www.nydailynews.com/news/national/grandma-sexually-assaulted-ex-cop-daniel-holtzclaw-speaks-article-1.2463029> [<http://perma.cc/NR27-BN88>] (for coming forward to complain).

or an alcoholic.²⁶⁹ Nonetheless she was still vulnerable, simply because she was Black and Holtzclaw assumed therefore she must fit one of those categories.²⁷⁰ Maleatra Montanez in Syracuse discovered that as well.²⁷¹ It is not helpful to Black women for social scientists and legal scholars to continue to define this type of violence as violence that is explainable because its victims are vulnerable.

C. Rapes of Black Women Are Under-Reported, Under-Investigated, and Under-Prosecuted

In a sense, it is amazing that Holtzclaw was indicted and tried, much less convicted. Sexual assaults against Black women are under-reported,²⁷² under-investigated, and under-prosecuted, in comparison to cases where White women are attacked.²⁷³ Two stereotypes of Black women intersect in the context of rape: the belief that Black women are “promiscuous” and the belief that they are “prone to lying.”²⁷⁴ Today, these beliefs still echo in the ways the

269. See Fenwick & Schwarz, *supra* note 229.

270. Coincidentally, this rationale also applies frequently in cases where several women have gone missing. For an example, see Stephanie Chen, *11 bodies, one house of horrors: Why Cleveland women were ‘invisible,’* CNN (Oct. 26, 2010, 2:49 PM), <http://www.cnn.com/2010/CRIME/10/26/cleveland.sowell.victims.one.year/index.html> [<https://perma.cc/4HHN-38RB>] (discussing the case of a Cleveland serial killer). Police often assume they are prostitutes or drug addicts. *Cf. id.* (talking about the targeting preferences of serial killers and public reaction which “blame[d] the victims in these cases for living a vulnerable and dangerous lifestyle,” although “family members and friends say their stories are far more complicated.”). Their cases are not investigated because the police view the women as unworthy. *See id.* Action is normally taken when the serial killer kills someone who is not normally in the category of vulnerable and that woman’s family has the social capital to force the police to do their jobs. *Cf. id.* (noting community belief that the lives of African American women do not matter as much as White women, leading to the inference that things would have been different if one of the Cleveland victims was White).

271. See Minnie Bruce Pratt, *Syracuse, N.Y., Black Lives matter demands ‘Stop Cop Rape,’* WORKERS WORLD (Dec. 8, 2016), <http://www.workers.org/2016/12/08/syracuse-n-y-Black-lives-matter-demands-stop-cop-rape> [<http://perma.cc/XFW6-KKNT>].

272. Most rapes are under-reported, but Black women under-report rape at a much higher level than White women. Allante Adams, *Why are Black women less likely to report rape?*, BALTIMORE CITY PAPER (June 9, 2015, 12:04 PM), <http://www.citypaper.com/news/mobtownbeat/bcpnews-why-are-black-women-less-likely-to-report-rape-20150609-story.html> [<http://perma.cc/26M7-TE6F>]. The reasons for the under-reporting are complex. *See* Patricia A. Broussard, *Black Women’s Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systematic Racism—Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 375–76, 376 n.13, 386 n.56 (2013) (discussing the tension in Black communities between race loyalty and gender identity, and whether a Black woman should betray race loyalty by reporting a Black male rapist to the police).

273. Jeffrey J. 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, 7, 42–43 (2006).

274. Zanita E. Fenton, *An Essay on Slavery’s Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOW. L.J. 319, 333 (2012) (“prone to lying”); Pokorak, *supra* note 273, at 22 (“promiscuous”).

criminal justice system views Black female rape survivors.²⁷⁵ After the Holtzclaw verdicts mainstream media was criticized for its lack of coverage of his arrest or trial, as few major media outlets deemed it a story of interest.²⁷⁶

There is no shortage of literature, either in social science or in law, on the subject of rape, and prosecutions of those alleged to have committed rape.²⁷⁷ The vast majority of it does not particularly focus on Black women as rape survivors.²⁷⁸ Though most crime, including rape, is intraracial, the literature focuses mainly on interracial rape, and specifically on rapes where the victim is a White woman and the alleged perpetrator is a Black man.²⁷⁹ However, some studies did have relevant findings with regard to rapes where Black women were the survivors. The works of Jennifer Nash, a social scientist, and Jeffrey Pokorak, a legal scholar cite some interesting work, respectively. In a wide-ranging article, Pokorak looks at the law's historical and contemporary treatment of the rape of Black women.²⁸⁰ He reviews literature dating back to the 1980s but his discussion of two studies, Cassia Spohn et al., and Spohn and Holleran from 2001 is worth noting.²⁸¹ “[P]rosecutors were 4[.5] times more likely to file charges if the victim was [W]hite, than if . . . Black.”²⁸² In the Spohn studies, the authors concluded that prosecutors prefer to initiate prosecution where “the defendant is Black and the victim is White.”²⁸³

275. Holtzclaw's defense was that the Black women who testified against him were “liars, criminals, and ‘junkies.’” Treva Lindsey, *The Media Failed Black Women By Not Covering This Rape Trial*, COSMOPOLITAN (Dec. 15, 2015), <http://www.cosmopolitan.com/politics/news/a50842/the-medias-disgraceful-silence-on-daniel-holtzclaw> [<http://perma.cc/S9RE-UWFF>].

276. *Id.* (pointing out that the press in general is indifferent to Black women's experiences).

277. See Jennifer C. Nash, *Black Women and Rape: A Review of the Literature*, BRANDEIS U. FEMINIST SEXUAL ETHICS PROJECT 1–2 (2009), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf> [<http://perma.cc/944B-AR8Z>].

278. See *id.*

279. See *id.* at 2.

280. Pokorak, *supra* note 273, at 1.

281. *Id.* at 38–39 (citing Cassie [sic] Spohn, Dawn Beichner, & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice,”* 48 SOC. PROBS. 206, 210 (2001); 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, 652 (2001)).

282. Pokorak, *supra* note 273, at 42 (footnote omitted).

283. *Id.* at 41 (discussing the Spohn's *Prosecutorial Justifications* article). Nash argues that most rapes where there is a Black survivor is a result of intraracial rape because most crime happens within the same racial groups. See generally Nash, *supra* note 277, at 2 (noting modern “research often compares legal outcomes in interracial versus intra-racial rape cases, or centers on the relationship between the race of the assailant and legal outcomes.”). Yet, she notes that most research steers towards interracial rape, specifically

Over one half of all cases where a Black woman was the survivor prosecutions were declined and the cases dismissed, compared to only thirty-one percent of cases where a White woman was the victim.²⁸⁴ Spohn and Holleran's work examined charging decisions in Kansas City and in Philadelphia.²⁸⁵ There the data demonstrated that prosecutors were likely to dismiss, even a stranger rape case, based on the race of the victim.²⁸⁶ Nash reviews several studies, including one by an organization called Making a Difference Project to End Violence Against Women International (MAD).²⁸⁷ The MAD project was interdisciplinary and reviewed data from 12,000 cases.²⁸⁸ As part of the project charging decisions were studied in eight jurisdictions.²⁸⁹ The study demonstrated that different results can occur for victims among communities of color, in contrast to White victims.²⁹⁰ Overall, the authors concluded victim race did impact charging decisions in the cases.²⁹¹

In his review of charging decisions in New York City, Professor Pokorak draws the connections between the historical treatment of Black women in slavery and contemporary prosecutorial decisions based on what he calls legally irrelevant factors (e.g., the race of the survivor).²⁹² His research suggests that prosecutors are influenced

where the rapist is a Black man and the survivor is a White woman. *Id.* Nash asserted that it has now become difficult to obtain data on intraracial rape as it relates to Black women. *See id.* at 1–2. The obvious comment is that yet again, research privileges conditions that impact White woman. I also discussed the dilemma of the lack of data on intraracial sexual assault versus interracial sexual assault with Caroline LaPorte. It produced another poignant moment between the two of us, where yet again our two communities were being disadvantaged on the same issue but in different ways. For Native American women, interracial rape is the main problem. *See* Sari Horwitz, *New law offers protection to abused Native American women*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/new-law-offers-a-sliver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html?utm_term=.749a9e9f8b51 [http://perma.cc/AV7J-FZQ5]. White men come onto tribal land and sexually assault native women who are unable to prosecute them. *Id.* LaPorte says the Federal government has data on interracial rape of Native women but it is difficult for organizations representing Native women to gain access to the data.

284. Pokorak, *supra* note 273, at 41.

285. *Id.* at 42.

286. *Id.*

287. Nash, *supra* note 277, at 5.

288. *Id.*

289. *Id.*

290. *Id.* at 6. “[M]ore cases involving [B]lack rape survivors [are] referred to [the] police, but fewer [were] . . . pursued by prosecutors.” *Id.* “Latina, Asian, Pacific Islander, and Native American rape survivors” were also “under-represented.” *Id.* There was an interesting break down in how judges handled the cases. Counts were dropped in cases where Latinas were the survivors, but entire cases dropped where Black women were the survivors. Nash, *supra* note 277, at 6–7.

291. *Id.* at 6.

292. Pokorak, *supra* note 273, at 40.

when making charging decisions in rape cases on factors such as the race of the victim.²⁹³ Pokorak provides several suggestions on how prosecutorial discretion can be tweaked to help eliminate the legally irrelevant factors.²⁹⁴ Some of his suggestions, naturally, rely on the law such as challenges to the decision making on Equal Protection grounds.²⁹⁵ He also recommends legislative solutions, such as legislatures requiring better statistical record keeping in the prosecutors' offices, which would help provide necessary data to track charging decisions.²⁹⁶ Pokorak suggested a multilayered process where more than one prosecutor would be involved in making the charging decision.²⁹⁷ Pokorak believed such a multilayered process would reduce the potential for legally irrelevant factors to influence decision making.²⁹⁸ His suggestions are well thought through, however they suffer from the same defects that the well-intentioned legislators who supported creating the Federal Sentencing Guidelines, which were supposed to eliminate disparity in sentencing, missed.²⁹⁹ The decisions, for example of whether something is legally relevant, cannot be unbundled from the racial stereotypes that the decision makers hold. The race of the victim is not actually legally irrelevant because of the stereotypes embedded in the law. In Pokorak's case, it's ironic because the first half of his article focuses so thoroughly on the historical roots of why Black women's bodily integrity is not respected in the law.³⁰⁰ He speaks of victim advocacy and the strength of it, but here again, this is White women's advocacy without any apparent recognition that the advocacy approach has not been successful for Black women.³⁰¹ And the mainstream movements against sexual violence are still resistant to address the racial disparities issue.³⁰²

293. *Id.* at 41.

294. *Id.* at 48–49.

295. *Id.* at 53.

296. *Id.* at 50.

297. *Id.* at 49.

298. Pokorak, *supra* note 273, at 50.

299. See generally *Jeff Sessions repeats mistakes of past by bringing back harsh charges, punishments*, DAILY PRESS (May 17, 2017, 9:20 AM), <http://www.dailypress.com/news/opinion/editorials/dp-edt-sessions-mandatory-0517-20170516-story.html> [https://perma.cc/9LGN-ATPM] (referring to “the dreadful unintended consequences of [the United States'] poorly conceived mandatory sentencing laws.”).

300. See Pokorak, *supra* note 273, at 1–2.

301. Referring to advocacy of ideas and practices that in practice only benefit White women, because they fail to take into account the experiences of racial minorities. For notes of the different experiences see Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 281–82 (1997).

302. See *id.* at 281–82, 298–99.

IV. THE POLICE AND BLACK WOMEN WHO HAVE BEEN VICTIMS OF DOMESTIC VIOLENCE

The police are involved in intimate partner violence in two ways: they can sometimes be the perpetrators of violence, and they can trigger all manner of violence when they respond to a report that a Black woman has been the victim of intimate partner violence.

A. The Police as Perpetrators of Intimate Partner Violence

It should not come as a surprise that law enforcement officers can commit domestic violence. For some officers, the very training they receive to perform effectively as the police make them well suited to abuse their authority within their intimate sphere.³⁰³ As society was made more aware of the frequency with which women were being abused by the intimate partners, the news stories about police officers killing or abusing their spouses could not be ignored.³⁰⁴ The International Association of Police Chiefs (IACP) received a grant from the DOJ's Office of Violence Against Women to study the issue of police intimate violence.³⁰⁵ In 2003, IACP published a policy paper on law enforcement intimate violence and released a model policy for agencies on the subject.³⁰⁶ All four of the statistical studies cited in the report are quite old, with the most recent one dated published in 2003.³⁰⁷ As the authors of one study noted, it was difficult to assess how much intimate violence was committed by law enforcement because, at the time, no benchmark study had been conducted by which a comparison could be made.³⁰⁸ The survey was sent to law enforcement offices to assess whether commanders were

303. Diane Wetendorf, *The Impact of Police-Perpetrated Domestic Violence*, DIANE WETENDORF, INC. 2–3 (2000), http://www.abuseofpower.info/Wetendorf_ImpactPoliceDV_FBI.pdf [<http://perma.cc/AR9A-LH83>].

304. Cf. Elliott C. McLaughlin, *We're not seeing more police shootings, just more news coverage*, CNN (Apr. 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html> [<https://perma.cc/AY28-BB5N>] (describing how videos and media coverage has helped drive awareness of police shootings and violence towards African American males).

305. IACP NAT'L LAW ENFORCEMENT POL'Y CTR., DOMESTIC VIOLENCE BY POLICE OFFICERS 1, 9 (2003), <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencebyPolicePaper.pdf> [<http://perma.cc/K5SR-HAPG>].

306. *Id.* at 2; IACP NAT'L LAW ENFORCEMENT POL'Y CTR., DOMESTIC VIOLENCE BY POLICE OFFICERS: MODEL POLICY 1, 1 (2003), <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/DomesticViolencebyPolicePolicy.pdf> [<https://perma.cc/CDG7-M75T>].

307. See DOMESTIC VIOLENCE BY POLICE OFFICERS, *supra* note 305, at 2.

308. CTR. FOR AM. & INT'L LAW, DOMESTIC ASSAULT AMONG POLICE: A SURVEY OF INTERNAL AFFAIRS POLICIES, http://www.cailaw.org/media/files/ILEA/Publications/domestic_99 [<http://perma.cc/BXZ9-HLZS>] [hereinafter DOMESTIC ASSAULT AMONG POLICE].

seeing an increase in the rate of officer perpetrated violence and to assess what policies were in place to handle reports of the same.³⁰⁹ Approximately twenty-nine percent of offices that responded, reported their impressions that the rate was increasing, and approximately forty-five percent of the respondents lacked official policies to handle complaints of officer perpetrated IPV.³¹⁰ In another study, also dated, forty percent of police respondents “reported marital conflicts [that] involv[ed] physical aggression” within the year before participation in the study.³¹¹ The IACP model policy is completely voluntary, as is the one on police officer perpetrated sexual assault.³¹² The policy focuses heavily on better screening of initial hires to weed out candidates who might fit the profile of a batterer, early warning strategies should a batterer actually be hired, and guidelines for supervisors on the process that should be used to handle an incident where an officer has been accused of IPV.³¹³

Though the data is now dated, the problem of officer perpetrated IPV has not dissipated. The *New York Times* and PBS program FRONTLINE worked together to survey fifty-six police departments on the issue of police abusers.³¹⁴ Experts stated the rate of police intimate abuse is under-reported, and departments may shield those officers who are accused.³¹⁵ One of the more interesting facts disclosed in the article is that “nearly 30 percent of the officers accused of domestic violence were still working in the same agency a year later, compared with 1 percent of those who failed drug tests and 7 percent of those accused of theft.”³¹⁶ On the Chicago Police Department, an officer could be fired immediately for testing positive for marijuana, but not for committing domestic violence.³¹⁷ Current data on the frequency of police initiated IPV is hard to find, but Professor Leigh Goodmark provides a list, culled from media sources, of 102 incidents of police perpetrated IPV between 2013 and 2015.³¹⁸ Not all spouses and partners of police officers are Black, but

309. *Id.*

310. *Id.*

311. Peter H. Neidig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD.: INT’L REV. OF POLICE DEV. 30, 30 (1992).

312. See DOMESTIC VIOLENCE BY POLICE OFFICERS: MODEL POLICY, *supra* note 306, at 1, 8; DOMESTIC VIOLENCE BY POLICE OFFICERS, *supra* note 305, at 1, 9.

313. DOMESTIC VIOLENCE BY POLICE OFFICERS: MODEL POLICY, *supra* note 306, at 2–5.

314. Sarah Cohen et al., *Departments Are Slow To Police Their Own Abusers*, N.Y. TIMES (November 23, 2013), <http://www.nytimes.com/projects/2013/police-domestic-abuse> [<http://perma.cc/7TUG-XDDQ>].

315. *Id.*

316. *Id.*

317. *Id.*

318. Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1185 n.10 (2015).

some are. Here again, they can be found in the news.³¹⁹ The incidents Professor Goodmark mentions in Baltimore are Black officers.³²⁰ Black officers in the District of Columbia, New York, Dallas, and Chicago have also murdered their wives.³²¹ Female police officers whose partners are police are also at risk for police perpetrated IPV.³²² This is another category of invisible victims. Police culture and fear of reprisals often keep these women from reporting their abuse partners and given police preference not to punish abusive officers, it is extremely difficult to locate women, much less Black women whose violent partners are the police.³²³

B. Violence When the Police Respond to Intimate Partner Violence and Missteps Along the Road to VAWA

When a Black woman is assaulted by an intimate partner she must think carefully about whether to seek the assistance of the police. Police intervention can be lethal for the partner, and it may also expose the woman, herself, to arrest and prosecution.³²⁴ Although all states, and the federal government have enacted laws to eliminate intimate partner violence,³²⁵ these laws have not provided the same beneficial impact for all women. The effort by Republicans in early 2013 to derail the reauthorization of the Violence Against Women Act provided an unusual opportunity for public assessment on the efficacy of the Act.³²⁶ Several articles questioned whether

319. See *id.* at 1219 (noting some examples of police-partner violence that received some coverage).

320. See *id.* at 1184–86 (describing the incidents).

321. See David Jackson, *Police Brutality Often Begins At Home*, CHI. TRIBUNE (Mar. 29, 1991), http://articles.chicagotribune.com/1991-03-29/news/9101280335_1_brutality-international-affairs-division-chicago-police-officer [<http://perma.cc/A4VG-JUBA>] (describing a Chicago incident). At one point in 1991 a group “of [B]lack female [] police officers, sponsored a workshop on . . . domestic violence in the police home.” *Id.*

322. Diane Wetendorf, *Female Officers as Victims of Police-Perpetrated Domestic Violence*, DWETENDORF.COM 1, 1 (Apr. 2007), http://www.dwetendorf.com/Wetendorf_FemaleOfficer.pdf [<http://perma.cc/D3L8-FPHB>].

323. *Id.* at 1–5.

324. Miriam Z. Pérez, *Seven Important Facts About the Violence Against Women Act at 20*, COLORLINES (Sept. 12, 2014, 7:00 AM), <http://www.colorlines.com/articles/seven-important-facts-about-violence-against-women-act-20> [<http://perma.cc/2Q9F-PFPF>].

325. See NAT’L CONFERENCE OF STATE LEGISLATURES, DOMESTIC VIOLENCE/DOMESTIC ABUSE DEFINITIONS AND RELATIONSHIPS (2015), <http://ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx> [<https://perma.cc/X2QH-8EF6>] (states); *Federal Domestic Violence Legislation: The Violence Against Women Act*, FINDLAW, <http://family.findlaw.com/domestic-violence/federal-domestic-violence-legislation-the-violence-against-women.html> [<https://perma.cc/DW8P-GRWK>].

326. See Karen McVeigh, *US Senate renews domestic violence bill despite Republican opposition*, THE GUARDIAN (Feb. 12, 2013, 6:14 PM), <https://www.theguardian.com/world>

VAWA legislation has been good for all women or just primarily middle class White women.³²⁷ The answer can be complicated as Beth Richie and Lisalyn Jacobs pointed out in an interview.³²⁸ In many respects the original Act signaled a “milestone” moment when Republicans and Democrats united with the domestic violence movement to recognize domestic violence as a problem that needed to be stopped.³²⁹ But in other respects, the reliance on criminal justice policies as the sole remedy for stopping violence against women is simply too narrow, and denies non-White women the same protection of law that White women receive.

The passage of the Violence Against Women Act (VAWA) was the culmination a thirty-year movement to eliminate intimate partner violence against women.³³⁰ Organizations worked diligently during that period to educate the public and state and federal legislators about the frequency and seriousness of violence that women were experiencing in the home.³³¹ The education process was necessary because the police often failed or refused to respond appropriately when a woman was injured by her intimate partner.³³² At the same time, it was widely believed only Black women and other poor women experienced heightened levels of violence within the home.³³³ If White women were to be protected, it became important

/2013/feb/12/rubio-violence-against-women-bill [https://perma.cc/EXA5-F7YH] (Republican opposition). The 2013 reauthorization included benefits for transgender women and lesbians. U.S. DEPT OF JUST. ARCHIVES, OFFICE ON VIOLENCE AGAINST WOMEN, VAWA 2013 NONDISCRIMINATION PROVISION: MAKING PROGRAMS ACCESSIBLE TO ALL VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING (2014), https://www.justice.gov/archives/ovw/blog/vawa-2013-nondiscrimination-provision-making-programs-accessible-all-victims-domestic [https://perma.cc/48MS-4L8T].

327. See Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), http://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act [http://perma.cc/VTL8-FMYS].

328. Rebecca Burns, *VAWA: A Victory for Women—But Which Women?*, IN THESE TIMES (Feb. 28, 2013), http://inthesetimes.com/article/14668/vawa_a_victory_for_women_but_which_women [http://perma.cc/VB3V-BNTZ]; see also Pérez, *supra* note 324 (noting comments from two advocates from communities of color about how conflicted they were about supporting the passage of VAWA knowing it could have adverse police consequences in their communities).

329. See Sharon Svec, *What is VAWA and Why Does it Matter*, YWCA (Oct. 15, 2012), http://ywcablog.com/2012/10/15/what-is-vawa-and-why-does-it-matter/#sthash.la4Yxx3R.dpbs [http://perma.cc/B8CG-5GV5].

330. Ruth Rosen, *Without Passage of Violence Against Women Act 20 Years Ago, We Might Not Be Talking About Ray Rice*, AM. PROSPECT (Sept. 12, 2014), http://prospect.org/article/without-passage-violence-against-women-act-20-years-ago-we-might-not-be-talking-about-ray [https://perma.cc/ZXZ3-CEJD].

331. See Fedders, *supra* note 301, at 284.

332. See *id.* at 287–88.

333. BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON*

for beliefs to change. Public awareness campaigns began to emphasize that violence was something all women experienced and all women experienced it equally.³³⁴ Between 1984 and the passage of VAWA, many states enacted so-called mandatory arrest policies, based on the alleged success of a project in Minnesota.³³⁵ The authors of the study concluded that arrest reduced the incidence of domestic violence.³³⁶ The National Institute of Justice sponsored a replication of the study in six states, which produced inconsistent results.³³⁷ Nonetheless, state legislators in conjunction with anti-violence movements seized the idea of mandatory arrests as an appropriate criminal justice solution to domestic violence.³³⁸ Many states adopted legislation mandating the police make an arrest when responding to a call about domestic violence.³³⁹ As the campaign towards the adoption of federal legislation to address domestic violence went forward, pro-arrest policies were woven into the drafts of the legislation.³⁴⁰ During this process, advocates for women of color

NATION 110 (2012); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman?: When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 76 (2008).

334. RICHIE, *supra* note 333; Goodmark, *supra* note 333, at 87. It was not true then, nor is it true now, that all women experience violence equally. Fedders, *supra* note 301, at 287.

335. LAWRENCE W. SHERMAN & RICHARD A. BERK, POLICE FOUND. REPORTS, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1 (1984), <https://www.policefoundation.org/wp-content/uploads/2015/07/Sherman-et-al.-1984-The-Minneapolis-Domestic-Violence-Experiment.pdf> [<https://perma.cc/L5V4-86LC>] (noting “the Minneapolis study strongly suggests that the police should use arrest in most domestic violence cases.”). In 1984, the National Institute for Justice sponsored what has become known as the “Minnesota experiment” where researchers randomly assigned complaints to the police into three categories: counseling, arrest and do nothing. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 16 (1992) (discussing the set-up of the experiment).

336. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effect of Arrests for Domestic Violence Assault*, 49 AM. SOC. REV. 261, 261, 270 (1984). In the report the authors cautioned against using the results to support wide spread mandatory arrests laws. *Id.* at 268–70.

337. See Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experience*, 28 CRIMINOLOGY 183, 183, 184 n.1 (1990) (discussing one of these such cases). The NIJ study found similar results in the two states where Sherman & Berk did the follow-up and the opposite results in three other states. See LAWRENCE SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 3 (1992); see generally CHRISTOPHER D. MAXWELL ET AL., NAT’L INST. OF JUST., U.S. DEPT OF JUST., THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 1 (2001), <https://www.ncjrs.gov/pdffiles1/nij/188199.pdf> [<https://perma.cc/TM2B-7KZJ>] (discussing results generally).

338. See Richard Davis, *Mandatory arrest: A flawed policy based on a false premise*, POLICEONE.COM (Mar. 30, 2008), <https://www.policeone.com/patrol-issues/articles/1679122-Mandatory-arrest-A-flawed-policy-based-on-a-false-premise> [<https://perma.cc/X6B4-9JS3>].

339. SHERMAN, *supra* note 337. In a later publication Sherman suggested that mandatory arrests has a deterrent effect when the perpetrator has “a stake in conformity.” *Id.* at 181.

340. See Pickert, *supra* note 327.

were conflicted.³⁴¹ On the one hand, Black women were experiencing violence, but on the other hand, they also knew that the police did not have the relationship with their communities as they did with White communities.³⁴² They feared increased police power would lead to increased aggressive policing of their communities and could potentially lead to heightened levels of retaliatory violence.³⁴³ For the most part, their concerns were dismissed or undervalued by movement leaders.³⁴⁴

The move towards pro-arrest policies contemplated mandatory arrest and “no drop” policies by the prosecutor’s office.³⁴⁵ The belief and hope of the domestic violence advocates were that these policies would force change in police departments that previously refused to arrest male batterers on a routine basis.³⁴⁶ However, the attempt to change cultural patterns of behavior and social justice policy through the use of criminal justice mechanisms is rarely successful.³⁴⁷ Domestic violence advocates were attempting to convince society to reject intimate partner violence as normative.³⁴⁸ Reliance on the most narrow means of change, criminal law, was misplaced. It does, however, reflect many of the legislative choices made by liberals in

341. See Broussard, *supra* note 272.

342. The following articles represent the critique of pro-arrest policies made in the first years after VAWA was passed. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1021–24 (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242, 1252–53 (1991); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 3, 6, 51 (1998); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 248 (1994); Karin Wang, *Battered Asian American Women: Community Responses from Battered Women’s Movement and the Asian American Community*, 3 ASIAN L.J. 151, 151 (1996).

343. See Fedders, *supra* note 301, at 297.

344. See *id.* at 287–88 (relating the history of the battered women’s movement away from violence against poor women towards the agenda of violence being against middle-class White women, while ignoring the racial dynamics of the problem). Fedders stated that White women supported mandatory policies because they were suspicious of police discretion, fearing that without the policies the police would not arrest. *Id.* at 289. For Black and poor women, increasing police presence in their communities would not necessarily make the Black woman safer. *Id.* at 292–94.

345. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFFALO CRIM. L. REV. 801, 805–06 (2001). Pro-arrest encourages the police to make an arrest in every domestic violence call. See *id.* at 806. No-drop is the policy authorizing prosecutors to go forward with a domestic violence case, even when the complainant does not want to go forward. *Id.* Coker calls these two aspects of the law “mandatory policies.” *Id.*

346. Fedders, *supra* note 301, at 282.

347. See Coker, *supra* note 345, at 830.

348. See *id.* at 829–30, 841; Fedders, *supra* note 301, at 281.

the same time period that VAWA passed.³⁴⁹ Law enforcement is not tasked with creating long-term change. Nor do the police use the language of social advocacy.³⁵⁰ When the police answer a call, they are responding to an event that is in progress at that moment or has just happened, and that is all.³⁵¹ The anti-violence movement spoke of IPV as patterns of practice over a period of time in an ongoing relationship.³⁵² But, the language of pro-arrest policies have to do with the incident that serves as the basis for the police response at that moment.³⁵³ The police will look for injuries at the time they arrive and not do an intensive investigation in what may have occurred in the past between the individuals involved in the call.³⁵⁴ Under pro-arrest policies, the police were required to make an arrest regardless of whether the incident was a misdemeanor or a felony.³⁵⁵ Anti-violence advocates had not anticipated the need to distinguish between the two, not realizing, or perhaps undervaluing the significance of arrest in misdemeanor cases.³⁵⁶ In response to VAWA, two unanticipated police responses began to develop: (1) some women

349. Almost every major legislative enactment on public policy issues signed by former President Bill Clinton has been a disaster for Black communities. The Omnibus Crime Control Bill, which VAWA is a part of, had a significant role to play in increasingly high levels of mass incarceration in Black communities. See Ben Norton, *Bill Clinton continues to defend 1994 crime bill that fueled racist mass incarceration*, SALON (May 13, 2016, 8:31 PM), http://www.salon.com/2016/05/03/bill_clinton_continues_to_defend_1994_crime_bill_that_fueled_racist_mass_incarceration [<http://perma.cc/9ZQ8-KWFL>]. The bill was so disastrous that Hillary Clinton, when campaigning for President, felt compelled to distance herself from it. Matthew Nussbaum, *Clinton calls parts of 1994 crime bill 'a mistake'*, POLITICO (Mar. 6, 2016, 9:27 PM), <http://politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/03/hillary-clinton-1994-crime-bill-220344> [<http://perma.cc/636P-VYAW>]. A very reluctant Bill Clinton also admitted that in hindsight the bill did not accomplish what he thought it would. See David McCabe, *Bill Clinton renounces his 1994 crime bill*, THE HILL (May 6, 2015, 4:16 PM), <http://thehill.com/blogs/blog-briefing-room/news/241247-bill-clinton-renounces-his-1994-crime-bill> [<https://perma.cc/RSB7-CUXC>]. Other pieces of legislation that adversely impacted Black communities were the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997); The Prison Reform Litigation Act, Pub. L. 104-134, 110 Stat. 1321 (1996); and the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996).

350. See David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest With Directions for Future Research*, 8 VIOLENCE AGAINST WOMEN 1449, 1456–58 (2002).

351. *Id.*

352. *Id.* at 1456.

353. See *id.* at 1458.

354. *Id.* at 1456–57.

355. Richard Davis, *Dual arrests and domestic violence arrests of women*, POLICEONE.COM (Apr. 7, 2005), <https://www.policeone.com/standoff/articles/98522-Dual-arrests-and-the-domestic-violence-arrests-of-women> [<http://perma.cc/HTR7-8BXL>].

356. *Id.* (critiquing the anti-violence movement's "one-size-fits-all" mandatory arrest solution); see also Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97, 97–98 (1995) (explaining that under mandatory arrest policies, police must arrest whether the incident was observed or not).

began to experience more violence when their intimate partners were arrested; and (2) women were arrested as “primary aggressors” or in dual arrests.³⁵⁷

C. Black Women Trapped in the “Unintended Consequences” of VAWA

During the period leading to the enactment of VAWA, Black women and Latinas warned that mandatory arrest policies might actually *increase* the rate of violence in their communities.³⁵⁸ The mainstream anti-violence advocates devalued the validity of this concern, usually cloaked in eerily paternalistic language.³⁵⁹ By 2002, it was clear that data was developing that suggested in some cases, advocates for Black women and Latinas were right, violence could increase as a result of mandatory arrest.³⁶⁰ The authors of the original Minnesota study themselves, published a follow-up study that showed the reduction in violence caused by mandatory arrest only had a six-month effect.³⁶¹ After that, levels of violence resumed.³⁶² Other studies showed there were identifiable factors that predicted retaliatory violence would occur.³⁶³ The factors were high rates of community economic instability, whether the offender was unemployed at the time of arrest, and whether alcohol and drug use were present.³⁶⁴ These were factors that impacted Black and Latina communities far more than middle-class White communities.³⁶⁵ All

357. See Hirschel & Buzawa, *supra* note 350, at 1449 (noting the increased numbers of women arrested by mandatory arrest policies); Walsh, *supra* note 356, at 99, 106 (noting potential for increased violence under mandatory arrest policies). Dual arrest occurs when the police cannot “determine [who the] primary aggressor” is, so both parties are arrested. Hirschel & Buzawa, *supra* note 350, at 1450.

358. Cf. Fedders, *supra* note 301, at 281–82.

359. See *id.* at 281.

360. See Lawrence W. Sherman & Heather M. Harris, *Increased death rates of domestic violence victims from arresting vs. warning suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1, 1 (2015).

361. Sherman, *supra* note 335, at 2–3, 29–30, 39–40. In the six states that attempted to replicate his study, level of violence decreased in three and increased in three. *Id.* at 25.

362. See SHERMAN, *supra* note 337, at 192.

363. See Bushra Sabri et al., *Factors Associated With Increased Risk for Lethal Violence in Intimate Partner Relationships Among Ethnically Diverse Black Women*, 29 VIOLENCE & VICTIMS 719, 720 (2014).

364. See *id.* at 720–21, 723; see also Craig A. Field & Raul Caetano, *Longitudinal Model Predicting Partner Violence Among White, Black, and Hispanic Couples in the United States*, 27 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1451, 1451–52 (2003) (studying the impact of alcohol consumption on rate of violence). “Black and Hispanic couples [experienced] . . . three times greater risk of MFPV.” *Id.* at 1451.

365. Coker, *supra* note 345, at 808–12; Michelle DeCasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 56, 61–62

social scientists who study the phenomenon of heightened lethality after mandatory arrest state that a much more extensive study on the risks of increased violence needs to be conducted.³⁶⁶ To date, the mainstream anti-violence movement has not supported a more comprehensive look at the racialized impact mandatory arrest has on heightened lethality for Black women and Latinas.³⁶⁷

The second unintended consequence of VAWA was the phenomenon of dual arrest.³⁶⁸ Dual arrest and the “primary aggressor” language is particularly problematic for Black women because they are less likely to be seen as victims by the police and more likely to be seen as aggressors thereby increasing the likelihood that Black women will be arrested more frequently, even if they are the ones who initiate the call for police assistance.³⁶⁹ The Office on Violence Against Women did show some concern over the increased numbers of women who were arrested under mandatory arrest policies.³⁷⁰ The office suspected some police officers were making dual arrest because they did not want to take the time or make the effort to actually determine which party was actually the aggressor.³⁷¹ As a result of this concern the office did revise some of its grant parameters.³⁷² Police agencies applying for VAWA funding had to be able to demonstrate that women were not being arrested solely to avoid having to make a determination of who the aggressor was.³⁷³ Some states

(2003); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 826 (2007) (arguing that feminists should no longer “advocat[e] for [or] support[] [the] criminalization” of domestic violence).

366. See Fedders, *supra* note 301, at 281, 298–300.

367. See *id.* at 295–96.

368. See Davis, *supra* note 355.

369. See Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J. L. & GENDER 147, 147 (2012) (recounting the difficulty Black women have when attempting to obtain orders of protection in civil proceedings).

370. See Devon Gray Thacker Thomas, *Mandatory Arrest Laws for Intimate Partner Violence: The Scales or the Swords of Justice?* 7 (Jan. 1, 2013) (unpublished PhD thesis, University of Colorado).

371. Cf. Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond*, 7 VIOLENCE AGAINST WOMEN 1339, 1357 (2001), <http://journals.sagepub.com/doi/pdf/10.1177/10778010122183900> [<https://perma.cc/L3KL-YDXC>] (discussing Delaware experiences).

372. SAVE: STOP ABUSIVE & VIOLENT ENVIRONMENTS, SPECIAL REPORT: PREDOMINANT AGGRESSOR POLICIES: LEAVING THE ABUSER UNACCOUNTABLE? 2 (2010), <http://www.save-services.org/downloads/Predominant-Aggressor-Policies> [<https://perma.cc/A5ZY-YT3D>].

373. See U.S. DEPT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, OVW FISCAL YEAR 2015 GRANTS TO ENCOURAGE ARREST POLICIES AND ENFORCEMENT OF PROTECTION ORDERS PROGRAM SOLICITATION 18 (2015), https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/03/31/final_fy_2015_arrest_solicitation_2_19_2015.pdf [<https://perma.cc/LW4C-YFT5>]. In an interesting twist, early data suggested single White women living with an intimate partner, and lesbians, were more likely to be arrested

responded by clarifying procedures requiring the police to make a principle aggressor determination.³⁷⁴ The use of “primary aggressor” language can still present problems for Black women because of the stereotypical belief that Black women are more prone to violence than White women. Again, the failure to do a race analysis of how Black women are viewed within the criminal justice system allowed anti-violence advocates to believe they were addressing the problem of victims being arrested, without providing solutions for those who were most adversely impacted.

The move toward “primary aggressor language” did not change policies in states that had dual arrest.³⁷⁵ Dual arrest appears to drive much of the rise in the number of women being arrested in the IPV context.³⁷⁶ In the dual arrest context, both parties are seen as mutual combatants and, therefore, both arrested.³⁷⁷ In an analysis of arrests of women victims, one prosecutor noted that the term “mutual combat” is usually of little assistance when trying to determine who should be arrested.³⁷⁸ Mutual combatant, according to the prosecutor, would normally be where the parties are evenly matched, which is rarely the case in a domestic violence context.³⁷⁹ In addition, the prosecutor noted that the term itself is used by different actors within law enforcement in different ways.³⁸⁰ For example, the police may indicate “mutual combat” when they cannot sort a “messy” scene, versus prosecutors who may use it to mean “both parties have injuries,” and then contrast that with instances where a judge may use the term to justify a not guilty verdict.³⁸¹ Where do Black women fit in the dual arrest context? Data is sparse. However, women from communities of color seem to experience arrest at a higher dual arrest rate than White women.³⁸² In New York for example, which

in the dual arrest situation. Hirschel & Buzawa, *supra* note 350, at 1450. It is impossible now to detect whether the race of the women was the motivating concern for OWAV.

374. Walsh, *supra* note 356, at 104.

375. David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. CRIM. L. & CRIMINOLOGY 255, 255–56 (2007).

376. *Id.* at 296 (demonstrating that the rate of dual arrest was higher in domestic violence cases than in non-domestic violence assaults). The data suggested that the inclusion of “primary aggressor language” in a state law did not negate the relationship between mandatory arrest and higher dual arrest rates.

377. *Id.*

378. Gael B. Strack, “*She hit me, too*” *Identifying the Primary Aggressor: A Prosecutor’s Perspective*, NAT’L CTR. ON DOMESTIC & SEXUAL VIOLENCE (Aug. 29, 2000), http://www.ncdsv.org/images/She_hit_me.pdf [<https://perma.cc/PTC3-AJJY>].

379. *Id.*

380. *Id.*

381. *Id.*

382. MARY HAVILAND ET AL., URB. JUST. CTR., THE FAMILY PROTECTION AND DOMESTIC

does have dual arrest, seventy percent of the women affected by mandatory arrest or dual arrest policies were Black or Latina.³⁸³ Connecticut retains a disproportionately high number of arrests of women, even among the states that retain dual arrest statutes.³⁸⁴ Again, racial data is difficult to find, but the news stories about the problem of survivors being arrested show photographs of Black women.³⁸⁵ The question of the increased rate of violence against some women did not receive a comprehensive treatment.³⁸⁶ However, mainstream anti-violence organizations have yet to support a comprehensive study of arrests of women by race and economic class.³⁸⁷

In 2012, scholar and activist Beth Richie succinctly identified why the mainstream anti-violence movement did not and more importantly, will not, move away from pro-arrest policies.³⁸⁸ Richie documents the history of the anti-violence movement, starting with its birth in grassroots organizing into what today is a movement run by professionals.³⁸⁹ She suggests that the mainstream anti-violence leaders allied themselves with law and order policies, known to adversely impact the poor and communities of color, in exchange for legitimacy, power, and access to federal dollars.³⁹⁰ She ties pro-arrest policies with the government's policy of mass incarceration of Black people.³⁹¹ Richie points out that the increase in rates of arrests of Black women and convictions for using self-defense when attacked by abusers is totally consistent with American criminal justice policies aimed at incarcerating large swaths of the Black community.³⁹² Richie's critique is damning. The problems created by mass incarceration in the Black community have been well-documented.³⁹³ Mass incarceration, hyperincarceration, and zero-tolerance programs for juveniles are so widely criticized that almost every state is moving away from them to eliminate or ameliorate the negative impact

VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY, FAM. VIOLENCE PROJECT 1, 7 (2001).

383. *Id.* at 27.

384. Sarah Smith, *In Connecticut, Calling For Help Carries Risks for Victims of Domestic Violence*, PROPUBLICA (Feb. 16, 2017, 9:00 AM), <https://www.propublica.org/article/in-connecticut-calling-for-help-carries-risks-victims-of-domestic-violence> [<https://perma.cc/MH7Z-NF4K>] (pointing out that the national rate of dual arrest is two percent, but in Connecticut between the years of 2011 and 2015, the rate was eighteen percent).

385. *Id.*

386. *Id.*

387. *See* RICHIE, *supra* note 333, at 92–98.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 99–124.

392. *Id.*

393. RICHIE, *supra* note 333, at 99–124.

of such policies on communities of color.³⁹⁴ Richie's critique is embraced by a small group of legal scholars within the anti-violence movement.³⁹⁵ Nonetheless, there has been no public change away from pro-arrest policies.³⁹⁶

D. Black Survivors Pay the Penalty for Failure to Do Race Analysis

The development of the legal understanding of who a battered woman is is well-documented, as is the critique of its formulation.³⁹⁷ Today, the concept of who can be battered continues to present barriers to effective legal protection for those women who use violence to defend themselves from a batterer.³⁹⁸ Professor Leigh Goodmark sums up the problem: a sympathetic battered women is passive, White, and heterosexual.³⁹⁹ If a woman fights back against her abuser, she can lose the sympathy the criminal justice system has for battered women, because she defies normative stereotypes.⁴⁰⁰ Although studies now show that a significant number of abused women do attempt to defend themselves with violence, albeit much more moderate violence than men use, the idea of women using violence still seems aberrant.⁴⁰¹ When women fight back both prosecutors

394. *Id.*

395. See, e.g., Donna Coker & Ahjane D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 596 (2015) (arguing that hyperincarceration policies make conditions worse for battered women); Krishna de La Cruz, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 79 (2017); Leigh Goodmark, *Should Domestic Violence be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 58 (2017); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL'Y 13, 38 (2011).

396. Advocates, speaking confidentially, reported hearing lawyers representing abused women of color make statements such as #BlackLivesMatter is irrelevant to their work, and routinely encourage clients to support maximum punishment against Black males, particularly when the offense was a misdemeanor. This suggests that these practitioners fail to understand the complexity of violence in the Black community.

397. Goodmark, *supra* note 333, at 84.

398. *Id.* at 83.

399. *Id.* at 91.

400. *Id.* at 94.

401. *Id.* at 92 (citing, among others, Susan L. Miller, *Victims as Offenders: The Paradox of Women's Violence in Relationships* 116–20 (2005); Swan & Snow, *infra* note 408, at 1028 (explaining almost all women who have been abused use violence. Authors argue it is important to place women's violence in the context of the situations they are encountering); Jane Murphy et al., *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, AM. U. J. GENDER, SOC. POLICY & L., 499, 515 (2003) (stating eighty-two percent of women fight back); Strack, *supra* note 378, at 7). See also Carolyn Rebecca Block, *How Can Practitioners Help An Abused Woman Lower Her Risk of Death?*, 250 NAT'L INST. OF JUST. REP.: INTIMATE PARTNER HOMICIDE 4, 7 (2003) (detailing abused women who kill have experienced more violence, have fewer

and judges can view these women as mutual combatants rather than victims of violence.⁴⁰² In a study of the comments made by judges when sentencing women for murder and manslaughter of their intimate partners, one researcher found that judges employed two techniques to justify sentencing of the women: they minimized the seriousness of the decedent's violence against the accused,⁴⁰³ and they described the women as being mutual participants in violent relationships—these women were violent and aggressive, and active participants in the assault.⁴⁰⁴

Several studies highlighted how the myth of the fragile, passive abused woman works to the disadvantage of Black women.⁴⁰⁵ Historically, Black women have been excluded from the normative definition of femininity.⁴⁰⁶ She will “act[] like a man” and fight back, and thereby reify the belief that she is a deviant woman.⁴⁰⁷ She can also be seen as an “inauthentic victim” because she is “loud and angry, rather than docile and weeping.”⁴⁰⁸ Marissa Alexander and Bresha Meadows are not household names, although they should be.⁴⁰⁹ Alexander, a Black mother in Florida, who chose to defend herself from an abusive partner, by firing a warning shot into the ceiling of their residence, was arrested, charged and convicted of aggravated assault with a deadly weapon, which exposed her to mandatory sentencing.⁴¹⁰ The judge in the case initially sentenced her to a twenty-year term of incarceration, despite the fact the abuser was not injured.⁴¹¹ Even after she prevailed on appeal, the female prosecutor in the case threatened to retry her on more serious charges.⁴¹²

resources than other abused women; have been *more* likely to seek police assistance after an episode of violence than other women)).

402. Goodmark, *supra* note 333, at 76.

403. Elisabeth C. Wells, “*But Most of All They Fought Together*” *Judicial Attributions For Sentences in Convicting Battered Women Who Kill*, 36 PSYCHOL. WOMEN Q. 350, 351 (2012).

404. *Id.*

405. Susan Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond*, 7 VIOLENCE AGAINST WOMEN 1339, 1348 (2001).

406. *Id.* at 1346.

407. *Id.* at 1348.

408. Suzanne C. Swan & David L. Snow, *The Development of a Theory of Women's Use of Violence in Intimate Relationships*, 12 VIOLENCE AGAINST WOMEN 1026, 1035 (2006).

409. John Caniglia, *Murder or self defense? Bresha Meadows accused of killing father*, CLEVELAND.COM (Aug. 12, 2016), <http://www.cleveland.com/metro/index.ssf/2016/08/murder-or-self-defense-bresha-meadows.html> [https://perma.cc/VJ7Z-SG5H]; Julia Dahl, *Fla. Mom gets 20 years for warning shots*, CBS NEWS (July 13, 2013), <https://www.cbsnews.com/news/fla-mom-gets-20-years-for-firing-warning-shots> [https://perma.cc/75KK-H9A6].

410. Dahl, *supra* note 409.

411. *Id.*

412. *Id.* Alexander was tried by Angela Corey, the Assistant State Attorney who prosecuted George Zimmerman, the gunman who killed Trayvon Martin. Zimmerman was

Alexander chose to plead, even though she had a legitimate self-defense claim, so that she could be released.⁴¹³ Alexander primarily relied on her family and grassroots organizers who fought to keep her case alive.⁴¹⁴ Her case had very low visibility among mainstream anti-violence groups.⁴¹⁵ Alexander's case is not unique—nor is it restricted to adult survivors.⁴¹⁶ Survivors can be children as well.⁴¹⁷ Bresha Meadows, a fourteen-year-old girl in Ohio, was arrested and initially charged as an adult with aggravated murder of her father, a man who had showered the family with abuse for over twenty years.⁴¹⁸ Bresha tried on multiple occasions to get help for her family.⁴¹⁹ She told guidance counselors at school about the violence.⁴²⁰ She ran away from home to a relative who was a police officer, but still no action was taken to provide relief to this child and her family.⁴²¹ Three months after she first tried to get help, she killed her father.⁴²² Again, it was a grassroots campaign of family and friends that organized to bring attention to Meadows's case.⁴²³

given bail, Alexander was not. Zimmerman successfully used Florida's "Stand Your Ground" rule, which was not made available to Alexander. *See* Donna Coker, "Stand Your Ground" in Context: Race, Gender, and Politics, 68 U. MIAMI L. REV. 943 (2014). When Alexander's appeal was successful, Corey wanted to retry Alexander and expose her to a sixty-year term of imprisonment. To avoid that risk, she "pled guilty to three counts of aggravated assault with a weapon . . . [with] credit for [time] served." *Florida "Warning shot" case ends in plea deal*, CBS NEWS (Nov. 25, 2014), <https://www.cbsnews.com/news/florida-warning-shot-case-ends-in-plea-deal> [<https://perma.cc/Q6AN-WMAB>].

413. Dahl, *supra* note 409. *See also* Kyoto Walker, *Marissa Alexander, Finally Free*, S. FLA. TIMES (Jan. 30, 2015), <http://www.sfltimes.com/news/local/marissa-alexander-finally-free> [<https://perma.cc/TY4C-8D5K>].

414. *See* FREEMARISSANOW, <http://freemarissanow.org> [<https://perma.cc/QT47-TMY6>] (displaying a website built by her friends and supporters, the Free Marissa Now Mobilization Campaign, that also organized a Twitter hashtag, #UntilMarissaIsFree and provides information about survivors of domestic violence). The campaign started the Marissa Alexander Justice Project and #SurvivedandPunished, a project to bring awareness to the stories of battered survivors who are incarcerated. Alexander was released from prison in 2017, after serving three years in prison and two years under house arrest. *Id.*

415. Tasasha Henderson, *Black Domestic Violence Survivors Are Criminalized From All Directions*, TRUTHOUT (June 4, 2015), <http://www.truth-out.org/news/item/31178-Black-domestic-violence-survivors-are-criminalized-from-all-directions> [<https://perma.cc/R2EH-AUSE>].

416. *See id.* (relating stories of other Black women survivors who were arrested for defending themselves).

417. Caniglia, *supra* note 409.

418. *Id.* (reflecting the prosecutor's decision to take the case out of adult court and send to juvenile court).

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Free Bresha*, FACEBOOK, <https://www.facebook.com/Freebresha> [<https://perma.cc/HN8R-GXAU>]. #FreeBresha was the hashtag created by her family and supporters.

Bresha accepted a plea to an involuntary manslaughter count and will be released in late 2017.⁴²⁴ Without the anti-violence movement doing a more nuanced and comprehensive analysis of violence against all women, stories like Alexander's and Meadows's will continue to repeat in the Black community.⁴²⁵

Many authors cautioned that doing a gender-neutral analysis of women's use of violence was incorrect, but also that the analysis had to be culturally competent and take into account how non-White women are impacted by violence and their use of violence in response.⁴²⁶ The failure of the anti-violence movement to do a thorough race and class analysis of police response to IPV leaves abused survivors like Alexander and Meadows outside of the protective rhetoric of anti-violence.⁴²⁷ Professor Goodmark cautions that the failure of battered women's advocates to address women's use of violence has negative consequences for the survivor.⁴²⁸ "The inability to tell their stories may prevent battered women from healing and exacerbate doubts about battered women's credibility."⁴²⁹ This is particularly harmful for Black women whose credibility is already always at issue.⁴³⁰ The second problem she identifies is the silencing of women by "replacing women's stories and experiences with professional judgments about what is best for battered women."⁴³¹

How then, do Black women fare, in general, as survivors? It is now a given that data specifically focused on Black women will be inadequate.⁴³² Nonetheless, there are several Bureau of Justice (BOJ)

They also created a FreeBresha Facebook page and used grassroots organizing to help provide support.

424. *Teen accepts plea deal for killing abusive father, gets reduced sentence*, RT (May 23, 2017), <https://www.rt.com/usa/389311-bresha-meadows-plea-deal> [<https://perma.cc/CN9A-546U>]. Bresha was sentenced to one year and a day in juvenile detention, to be followed by six months of confinement in a mental health facility, and then two years of probation. She was due to be released July 29, 2017. *Id.* The family raised the money necessary to pay for her mental health counseling through grassroots efforts. She was transferred to a mental treatment facility in July 2017.

425. Henderson, *supra* note 415.

426. Claire Renzetti, *The Challenge to Feminism Posed By Women's Use of Violence in Intimate Relationships*, in *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 42–56 (Sharon Lamb ed., 1999), https://books.google.com/books?hl=en&lr=&id=_gUUCgAAQBAJ&oi=fnd&pg=PA42&dq=gender+neutral+analysis+of+women%27s+use+of+violence&ots=foLJ3BBLjx&sig=DS_neUP27uElkJ86AC7sl37hGbY#v=onepage&q=gender%20neutral%20analysis%20of%20women's%20use%20of%20violence&f=false [<https://perma.cc/88UP-GS4B>].

427. Goodmark, *supra* note 333, at 102.

428. *Id.* at 114.

429. *Id.*

430. *Id.*

431. *Id.*

432. *See id.* (discussing how Black women face challenges that White women do not in these circumstances).

statistical reports that may allow a picture of Black female survivors to develop.⁴³³ The relevant reports are: (1) the Special Report on Women Offenders;⁴³⁴ (2) Report on Felony Defendants in Large Urban Counties;⁴³⁵ and (3) Prisoners in 2014.⁴³⁶ The Bureau of Justice Special Report on Women Offenders, estimated that one in every 77,000 women committed a murder.⁴³⁷ Of the women who murdered, sixty percent of them killed an intimate or a family member.⁴³⁸ At the state level, women represented eight percent of violent felons.⁴³⁹ Even in 2000, the year of the report, researchers noted that at the state level, the biggest increase in violent crime for women seemed to be for aggravated assault, which the researchers thought might be related to the increase in women being arrested for domestic violence.⁴⁴⁰ The report, though old, does provide a racial break down of women in federal and state prisons.⁴⁴¹ The number of Black women under custodial supervision exceeded the number of White women in every single custodial condition but one: probation.⁴⁴² There were significantly more Black women in county jails, state prisons, and federal prisons than White women, despite the fact that Black women are only about twelve percent of the national population.⁴⁴³ The BOJ has not published another report specifically on women offenders, but information about Black women can be gleaned from the annual prison update.⁴⁴⁴ Reportedly, Black women are convicted of killing their abusers by a two-to-one ratio compared to White women.⁴⁴⁵ Black women were sentenced at a higher rate than White

433. E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2014 1–33 (2015); Lawrence A. Greenfeld & Tracy L. Snell, *Women Offenders*, BUREAU OF JUST. STAT.: SPECIAL REP. 1–14 (1999); Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009*, BUREAU OF JUST. STAT. 1–40 (2013).

434. Greenfeld & Snell, *supra* note 433.

435. Reaves, *supra* note 433.

436. CARSON, *supra* note 433.

437. Greenfeld & Snell, *supra* note 433, at 4. This number is contrasted with one in 8,700 men. *Id.*

438. *Id.* Only 20 percent of men killed an intimate or a family member.

439. *Id.* at 5.

440. *Id.* at 5–6.

441. *Id.* at 7.

442. Greenfeld & Snell, *supra* note 433, at 7. In the context of probation, sixty-two percent of White women were under probation while only twenty-seven percent of Black women were under probation.

443. *Id.* In New York in 2002, 3,133 women were incarcerated. Of those, 57 percent were African American, 27 percent were Latina and 19 percent were White. *Id.*

444. CARSON, *supra* note 433, at 15.

445. *Fact Sheet on Domestic Violence & the Criminalization of Survival*, FREEMARISSA NOW, <http://www.freemariissanow.org/fact-sheet-on-domestic-violence--criminalization.html> [https://perma.cc/H4PF-NQXH].

women for murder and aggravated assault, the two violent crimes that track most closely to survivors of domestic violence who are incarcerated.⁴⁴⁶ The BOJ data on prisons for 2014 focused primarily on the reduction of rates of incarceration under new federal and state policies.⁴⁴⁷ Very few categories in the report were broken down by gender and race, although one chart does show that the rate of imprisonment for Black women continues to outstrip the rate of imprisonment for White women in all age categories.⁴⁴⁸ The incarceration rate for murder and aggravated assault was higher, although curiously, incarceration for manslaughter was lower for Black women than White.⁴⁴⁹

The Felony Defendants in Large Urban Counties included statistics on felonies including murder and aggravated assault.⁴⁵⁰ It also compiled data such as prior arrests or convictions by those committing felonies such as whether they were detained or bailed pretrial, rate of flight, and other factors.⁴⁵¹ Unfortunately, gender and race differentials are only mentioned in the demographic characteristics section of the report.⁴⁵² At that time, forty-five percent of all defendants were Black.⁴⁵³ One table shows the percentages for crime for women, but race within the gender category is not broken down.⁴⁵⁴ It is yet another example of a missed opportunity to provide data that reveals something about Black women convicted of violent crime.⁴⁵⁵ It cannot be more apparent that data focused on Black women offenders must be made available so that the factors that drive their offending, as well as the sentences they receive can be understood. Until such data is made available, it will be impossible to determine where, how, and to what degree Black survivors of domestic violence are being unfairly punished.⁴⁵⁶

446. CARSON, *supra* note 433, at 15.

447. *Id.* at 2.

448. *Id.* at 15.

449. *Id.* at 16 (explaining the rate of manslaughter was 1.5% for White women and .8 for Black women). It would be an interesting research question whether White women were getting the benefit of the "victimhood" at the charging or plea bargaining stage. The Sentencing Project also notes the change in rate of incarceration between White females and Black females, with White incarceration rising while Black incarceration drops. Black females are still, however, over-represented in the prison population.

450. Reaves, *supra* note 433, at 3.

451. *Id.* at 15.

452. *Id.* at 5.

453. *Id.*

454. For example, the rate at which murders and assaults were recorded is eight percent and eighteen percent respectively. But there is no way to deduce which part of the nine percent is composed of Black women. *Id.* at 6.

455. *Id.* at 6.

456. *Survived and Punished: End the Criminalization of Survivors of Domestic and*

Finally, the failure to address women's use of violence in self-defense is now creating barriers for Black women survivors re-entering their communities after serving out their sentences.⁴⁵⁷ They now find that services for battered women are not available to them, because of their criminal records.⁴⁵⁸ This is true, even if they become victims of violence after they re-enter.⁴⁵⁹ Worse still, if the woman has children in the home who are also being subjected to violence, the mother may not be able to obtain an order of protection to cover herself and her children.⁴⁶⁰ Surely, when the mainstream anti-violence movement was contemplating joining forces with law enforcement, it did not foresee complications such as these arising.⁴⁶¹ But, they have arisen, and service providers and nonmainstream advocates have made the complications known.⁴⁶² Now, more than ever, it seems appropriate for the anti-violence community to respond.

V. WHY DO WE NEED TO KNOW ABOUT STATE VIOLENCE TOWARDS BLACK WOMEN

There is a really easy answer to the question of whether the race or ethnicity specific designation matters. The simple answer is, it does. It matters in critically important ways, both to the individual constituent groups and equally as important to the women's organizations themselves.⁴⁶³

A. *Why It Matters to Black Women*

As with any victim who suffers an injury, a significant part of healing requires that others acknowledge the injury.⁴⁶⁴ In international transitional justice literature, it is considered a reinjury when a survivor's trauma is denied or ignored by the society in which she lives.⁴⁶⁵ Recent research with the descendants of the Holocaust have

Sexual Violence, SURVIVED & PUNISHED, <http://www.survivedandpunished.org> [<https://perma.cc/4ZCN-29XN>].

457. Courtney Cross, *Reentering Survivors: Invisible at the Intersection of the Criminal Legal System*, 311 BERKELEY J. GENDER L. & JUST. 60, 102 (2016).

458. *Id.* at 64.

459. *Id.* at 77.

460. *Id.*

461. *Id.* at 95.

462. *Id.* at 100.

463. Cross, *supra* note 457, at 91.

464. See INT'L CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRANSITIONAL JUSTICE (2009), <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [<https://perma.cc/DFH6-YUFZ>].

465. See Gabriela Lopez-Zeron & Jose Ruben Parra-Cardona, *Elements of Change Across Community-Based Trauma Interventions*, 34 J. SYSTEMIC THERAPIES 60, 63–64 (2015). See also U.S. AGENCY FOR INT'L DEV., SNAPSHOT: INSTIGATING DIALOGUE ON

demonstrated that the trauma of genocide created a post-traumatic stress disorder (PTSD) in its survivors.⁴⁶⁶ Scientists now claim that the PTSD is transmitted to descendants through genetic memory.⁴⁶⁷ If such is the case for survivors of a trauma and their descendants who experienced the trauma a mere seventy-five years ago, what level of transmission must be present among Blacks subjected to 400 years of active trauma?⁴⁶⁸ Black women need to know that their injuries are no longer going to be invisible, that the end of deniability is coming, so that they can begin the long road towards healing.

Service providers for Black women need to have the most current and complete information about the populations they serve to help shape medical support where needed, social services support, educational support, and mental health services. For example, if Black women are less likely to report they have been sexually assaulted, advocates need to be able to work with health care providers to provide avenues for women to confront their injuries and let them know services are available. Communities need to know whether they have sufficient resources on hand such as shelters and affordable housing. Accurate and concrete data is needed to help shape legal strategies across the board. Those who lobby state and federal governments for funds need information; those helping to shape legislation need information. The lawyers who help shape defenses of Black women who end up on the wrong side of a police baton, on the wrong side of a prison cell, or in a coffin, need information. Effective strategy for Black women cannot be developed around the false representation that “all women experience violence equally.”⁴⁶⁹

B. Why Does It Matter to Mainstream Women's Movements?

The million-dollar question is whether what happens *specifically* to Black women matters to the mainstream women's movements,

TRANSITIONAL JUSTICE, https://www.usaid.gov/sites/default/files/success/files/120512%20OTI_Success_Story_PILPG.pdf [<https://perma.cc/KV4W-KSH4>] (USAID officials, along with others, were surprised when Libyan women wanted both assistance for women who were raped and an acknowledgment that they had been raped).

466. Jeffrey Kluger, *Genetic Scar of the Holocaust: Children Suffer Too*, TIME (Sept. 9, 2010), <http://content.time.com/time/health/article/0,8599,2016824,00.html> [<https://perma.cc/6BS5-H7LP>]; Tori Rodriguez, *Descendants of Holocaust Survivors Have Altered Stress Hormones*, SCI. AM. (Mar. 1, 2015), <https://www.scientificamerican.com/article/descendants-of-holocaust-survivors-have-altered-stress-hormones> [<https://perma.cc/R5ZB-REUB>].

467. Kluger, *supra* note 466; Rodriguez, *supra* note 466. *But see* Seema Yasmin, *Experts debunk study that found Holocaust trauma is inherited*, CHI. TRIBUNE (June 9, 2017), <http://www.chicagotribune.com/lifestyles/health/ct-holocaust-trauma-not-inherited-20170609-story.html> [<https://perma.cc/24Z9-5VAS>].

468. *Cf.* Kluger, *supra* note 466 (detailing the potential genetic effects on young generations from trauma experienced by older generations); Rodriguez, *supra* note 466.

469. Kimberlé Williams Crenshaw, *The Marginalization of Sexual Violence Against Black Women*, 2 NAT'L COAL. AGAINST SEXUAL ASSAULT J. 1, 6 (1994).

both the anti-violence movement specifically, as well as other mainstream women's groups. The lack of response to data and the literature about Black women seems to suggest that their experiences do not matter in the larger scope of the women's movement.⁴⁷⁰ This is an uncomfortable conclusion, and it raises many repeated instances where opportunities for real partnerships and for the development of strong trust bonds between Black women and White women have been squandered.⁴⁷¹ History is replete with instances in which issues of the time should have provided fertile opportunities for solid alliances between the women.⁴⁷² But the political relationship between Black women and White women has always been rocky. For example, there are fiery debates about the role of White women played vis-à-vis cruelty in the plantation era south.⁴⁷³ There is the betrayal of Black people and Black women specifically in the suffragette movement, for example.⁴⁷⁴ There was complicity in the eugenics movement which advocated for forced sterilization of Black women, along with mentally ill women in order to legitimize the availability of birth control.⁴⁷⁵ There was White women's enthusiastic participation in lynching celebrations and their opposition to school integration where White women, some of them mothers themselves, spat, cursed and hurled objects at Black women's children when they attempted to go to school.⁴⁷⁶ The unwillingness or inability of mainstream women's movements to acknowledge the depth of Black women's victimization feels akin to a continuation of that history rather than a break from it.⁴⁷⁷

It should matter to White women because as feminist organizations continue to pair the reduction of violence against women with police enforcement, they become complicit in the performance of state violence against Black women.⁴⁷⁸ It does not matter that policies are well-intentioned.⁴⁷⁹ Some of the worst pieces of legislation passed in

470. Cross, *supra* note 457, at 92.

471. See, e.g., MORRIS, *supra* note 18, at 187; ROBERTS, *supra* note 20, at 56.

472. See, e.g., ROBERTS, *supra* note 20, at 69.

473. MORRIS, *supra* note 18, at 187 (discussing legal cases where White wives of plantation owners, beat and killed Black women and men).

474. Madelyn C. Squire, *Discovering Our Connections: Reflections on Race, Gender and the Other Tales of Difference*, 23 GOLDEN GATE U. L. REV. 795, 803 (1993).

475. See ROBERTS, *supra* note 20, at 56–81.

476. *Without Sanctuary: Photographs and Postcards of Lynchings in America*, WITHOUTSANCTUARY, <http://withoutsanctuary.org> [<https://perma.cc/A3SD-Z3RN>]. See *Telling the Stories of the Century: 1957: The Civil Rights Movement*, COLUM. JOURNALISM SCH., <http://centennial.journalism.columbia.edu/1957-the-civil-rights-movement> [<https://perma.cc/2MRT-XBD9>] (displaying an iconic image from the period of desegregation).

477. Cross, *supra* note 457, at 92.

478. *Id.* at 94.

479. *Id.*

the last twenty years were cosponsored by well-intentioned liberals, who were ignorant of, or refused to consider the complex interaction between criminal justice in the United States and racism.⁴⁸⁰ To the extent that mainstream women's organizations refuse to, or are unable to acknowledge the distinctiveness of violence against Black women, they will also refuse to acknowledge the distinctiveness of violence against Native American women, against Latinas, and against Asian women.⁴⁸¹ Is this legacy of complicity in violence the legacy women's organizations are hoping for?

From a purely interests-convergence perspective, it should matter because to the extent that there are some women who do not have the rights of White women, then the rights of all women (including White women) are weakened. It should matter to White women because many women in the United States—who are Black, who are poor, or who may have criminal records when they reacted to save their own lives from abuse and violence and violated some normative value established for women—remain outside of the bubble of feminist advocacy.⁴⁸² These are the very women who need the help and support of a national women's movement.⁴⁸³ But if they are not valued as women, and if their wounds are not recognized as wounds, even if they are shaped differently, women's organizations will never be able to move from ignoring their issues to creating space for them under the women's umbrella. And the failure of all women to work towards the elimination of state-sponsored violence against Black women, and women from communities of color, would be a failure of epic proportions for the women's movements of today.

480. ASHLEY NELLIS, JUDY GREENE & MARC MAUER, REDUCING DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 7 (Ashley Nellis et al. eds., 2d ed. 2008).

481. Susan Brison, *An Open Letter from Black Women to Slutwalk Organizers*, HUFFINGTON POST (Sept. 23, 2011), http://www.huffingtonpost.com/susan-brison/slutwalk-Black-women_b_980215.html [<https://perma.cc/8G2U-JHC6>].

482. Goodmark, *supra* note 333, at 120.

483. *Id.* at 121–22.