Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome

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ARTICLES

MULES', MADONNAS, BABIES, BATHWATER, RACIAL IMAGERY AND STEREOTYPES: THE AFRICAN-AMERICAN WOMAN AND THE BATTERED WOMAN SYNDROME

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* This reference is to African-American women, taken from a work written by African-American novelist Zora Neale Hurston (1891-1960). ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 14 (1990). Hurston was considered a "colorful and flamboyant" figure who was a part of the era known as the Harlem Renaissance. BLACK WOMEN IN AMERICA 598 (Darlene Clark Hine et al. eds., 1993). A graduate of Barnard College, she collaborated with other black literary giants of that era, including Langston Hughes and Alain Locke. In many of her works Hurston dealt with the issues of sexism and racism. She set her stories in black communities, and recreated the dialect of poor southern African-Americans as the vehicle for communicating her stories. Hurston's most popular novel, Their Eyes Were Watching God, was published in 1937. The central character, Jamie, an African-American woman living in Eatonville, Florida, Hurston's hometown, struggles with her identity in a world that is defined by gender and race.

The use of the word "mules" in the above title comes from the following passage in the novel where Nanny, Jamie's grandmother, explains the place black women hold in society: "De nigger woman is de mule uh de world so fur as Ah can see. Ah been prayin' fuh it tuh be different wid you." HURSTON, supra, at 14.

Mules is juxtaposed with the word Madonna to signify the difference between the imagery of African-American women as contrasted with others, primarily white women. See discussion infra part III.

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INTRODUCTION

For the past few years, feminists, lawyers, law professors, clinicians and battered women's advocates have been debating whether the battered woman syndrome is helpful in explaining why women in abusive situations remain with their abusers and why some women kill their intimate partners. Legislators have amended the evidence codes to allow expert testimony on the battered woman syndrome at trials where women have claimed self-defense or insanity. Congress, in the Violence Against Women Act, codified as part of the Violent Crime Control Act, directed the Attorney General and the Secretary of Health and Human Services to provide various legislative committees with a report on the medical and psychological basis of battered woman syndrome, as well as evidence of how this type of testimony has been used in criminal trials. One state has considered codifying a separate battered woman's defense. Governors have been lobbied to use their clemency power to free battered women who are serving prison sentences.

1. Moseley v. State, 73 So. 791 (Miss. 1917); see discussion infra note 224.
2. See Joe Hallinan, Feminists Dispute Battered Women Syndrome, CLEVELAND PLAIN DEALER, Sept. 20, 1994, at 7E; see also Lee H. Bowker, A Battered Woman's Problems Are Social, Not Psychological, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 154 (Richard J. Gelles & Donillen R. Loseke eds., 1993).
3. See discussion infra part VI.
The common law accepts the admissibility of expert testimony on the battered woman syndrome.\(^7\) However, some commentators question the effectiveness of such testimony in gaining acquittals for defendants.\(^8\)

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7. The federal and state rules of evidence establish the admissibility of expert testimony at trial. The rules of evidence require that scientific, technical or other specialized knowledge assist the trier of fact in understanding the evidence, or in determining a fact at issue. FED. R. EVID. 702. Until 1993, federal courts and a majority of state jurisdictions relied on what was known as the Frye test to determine whether certain types of expert opinion warranted admissibility. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye rule required that the scientific evidence had "gained general acceptance in the particular field in which it belong[ed]." Id. at 1014.

During the 1980s, state courts began to admit expert testimony on the battered woman syndrome. See Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Hodges, 716 P.2d 563 (Kan. 1985); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Kelly, 478 A.2d 364 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); State v. Allery, 682 P.2d 312 (Wash. 1984). But see State v. Norman, 378 S.E.2d 8 (N.C. 1989) (overturning appeals court decision to allow expert testimony in case where abuser was asleep). In People v. Aris, 264 Cal. Rptr. 167 (Ct. App. 1989), the California Court of Appeals held that although Brenda Aris should have been allowed to present expert testimony, the error was harmless. Id. at 181-82. In 1990, the Ohio Supreme Court overturned State v. Thomas, 423 N.E.2d 137 (Ohio 1981), in Kost v. State, 551 N.E.2d 970 (1990), ruling that battered woman syndrome testimony is admissible.


In Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), the Supreme Court interpreted Rule 702 and determined that 702 was not limited by the Frye test, ruling that scientific reliability was not solely determined by whether the evidence had gained general acceptance. Id. However, the Daubert case applied to the federal rules, and state jurisdictions interpreting state rules of evidence regarding expert testimony may still follow the Frye test. Although Daubert has been cited in nearly 200 appellate cases, as of July 1995 only 17% of these cases have dealt with social and behavioral science evidence. See James T. Richardson et. al, The Problems of Applying Daubert to Psychological Syndrome Evidence, 79 JUDICATURE 10, 15 (1995). The author questions whether the courts' Daubert criteria can be applied to psychological syndrome evidence.

8. See Elizabeth M. Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 14 WOMEN'S RTS. L. REP. 213 (1992); see also A. Renee Callahan, Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome, 3 AM. U. J.
These scholars raise issues concerning stereotyping (i.e., creating a classic battered woman image) and stigma (i.e., battered women who kill are crazy). This article will discuss whether race based stigma preclude black women from being considered vulnerable to battering because the stereotypes of black women are in contradiction to those associated with a "classic" battered woman. The question may seem odd, but when one considers the historically negative perceptions of African-American women and the current mythology of who is a "real" battered woman, the issues become clearer.

Facts from a recent case help to illustrate how the conduct of a battered black woman is contrasted with the perception of how a battered white woman responds. A twenty-nine year-old black woman, Pamela Hill, lived with her abusive boyfriend, Roy Chaney. At trial, the evidence revealed that police had been called to Hill's residence on five separate occasions to protect her. According to the police report, on the night in question, Chaney had been drinking and began slapping Hill. Hill got a knife and the two began struggling over it. Hill got control of the knife and suffered several cuts before fatally wounding Chaney. Hill told the police that she had been trying to kick Chaney out of her public housing apartment, "[b]ut she couldn't just throw him out into the cold." At trial, the prosecutor provided evidence that Hill had stabbed Chaney the year before, and therefore in his opinion, the relationship was "mutually combative." In his closing argument, the prosecutor made this statement: "[A] lot of people would have you believe Pamela Hill is carrying the banner of Nicole Simpson." The contrasts between the two cases could not be more stark.

The imagery and stereotypes that were raised by the prosecutor's comparison of Pamela Hill and Nicole Simpson cannot be missed. Nicole Simpson was white, beautiful, rich, portrayed as a good mother, and...
brutalized. Pamela Hill is black, poor, an unwed mother, and considered violent. Hill was convicted and received a sentence of five to twenty-five years. The prosecutor, in making the statement about Pamela Hill “carrying the banner of Nicole Simpson,” wanted to make sure that the jurors had a picture in their minds of a real battered woman. However, without discounting the seriousness of the domestic violence conviction of O.J. Simpson, in comparing the situations of Nicole Brown Simpson and Pamela Hill, Hill’s situation appears to be more desperate because of her lack of resources and options.17

Part I of this article reviews psychological theories concerning responses to trauma and battered woman syndrome. Part II provides a socio-historical discussion of the African-American woman that explains how her race, sex and class have distinguished her from white American females counterparts. Part III analyzes stereotypes and the role they play in perceptions of African-American women. Part IV examines these stereotypes as an extralegal factor that can influence jury deliberations. Part V discusses the usefulness of battered woman syndrome testimony for African-American female defendants. Finally, Part VI provides suggestions for legislatures that may be contemplating changes to their state’s self-defense and/or evidence statutes to incorporate battered woman syndrome testimony.

This author concludes that when there is evidence that a woman charged with killing her spouse or lover may have been victimized by an abuser, she should be afforded the opportunity to introduce that evidence at trial to explain her actions. However, a defendant’s race and the stereotypes that accompany it must be taken into consideration when selecting a jury and before making the decision to use an expert at trial. The expert’s testimony must be framed in a way that addresses the racial stereotypes that would otherwise obfuscate the psychological impact of the abusive situation. Those stereotypes include that a black woman is either very strong or somehow inherently bad, but never weak or passive.18 Further, a black female defendant may need additional expert testimony to explain why certain characterizations and/or cultural behavior which may be inconsistent with the notion of dependency do not negate the fact that an African-American woman can be trapped in a violent relationship.

18. See infra part III for a discussion on the historical stereotypes of black women (e.g., mammy, Jezebel, Aunt Jemima, Sapphire).
Trauma is one of the nation’s most critical public health problems.\textsuperscript{19} Mental health experts have developed what is known as trauma theory to explain how some humans respond to physical or emotional injury.\textsuperscript{20} One reaction to trauma is post-traumatic stress disorder. Post-traumatic stress disorder (PTSD) is a diagnostic category listed in the \textit{Diagnostic and Statistical Manual of Mental Disorders} (known as DSM-IV-R) of the American Psychiatric Association,\textsuperscript{21} and is recognized as a normal

\begin{itemize}
\item[A.] The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one’s life or physical integrity; serious threat or harm to one’s children, spouse, or other close relatives and friends; sudden destruction of one’s home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence.
\item[B.] The traumatic event is persistently reexperienced in at least one of the following ways:
  \begin{itemize}
  \item[1.] recurrent and intrusive distressing recollections of the event (in young children, repetitive play in which themes or aspects of the trauma are expressed)
  \item[2.] recurrent distressing dreams of the event
  \item[3.] sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)
  \item[4.] intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma
\end{itemize}
\item[C.] Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following:
  \begin{itemize}
  \item[1.] efforts to avoid thoughts or feelings associated with the trauma
  \item[2.] efforts to avoid activities or situations that arouse recollections of the trauma
  \item[3.] inability to recall an important aspect of the trauma (psychogenic amnesia)
\end{itemize}
\end{itemize}

\begin{itemize}
\item[20.] See \textsc{Charles R. Figley}, \textit{Trauma & Its Wake} (1985).
\item[21.] \textsc{American Psychiatric Ass’n}, \textit{Diagnostic and Statistical Manual of Mental Disorders} 146-48 (3d ed. rev. 1987). The diagnostic criteria for post-traumatic stress disorder are:
\end{itemize}
reaction to an abnormal amount of stress. PTSD was originally identified after doctors observed the psychological reactions suffered by combat veterans. Other trauma, including battering, rape, (e.g.,

(4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills such as toilet training or language skills)
(5) feeling of detachment or estrangement from others
(6) restricted range of affect, e.g., unable to have loving feelings
(7) sense of a foreshortened future, e.g., does not expect to have a career, marriage, or children, or a long life

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following:
(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response
(6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event (e.g., a woman who was raped in an elevator breaks out in a sweat when entering any elevator)

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month.


23. Before the psychological terminology became more sophisticated, soldiers exhibiting PTSD were described as “shell shocked.” See John P. Wilson, Toward an Understanding of Post-Traumatic Stress Disorders Among Vietnam Veterans, TESTIMONY BEFORE U.S. SENATE SUBCOMMITTEE ON VETERAN AFFAIRS 1-3 (1980); see also JIM GOODWIN, THE ETIOLOGY OF COMBAT-RELATED POST-TRAUMATIC STRESS DISORDERS IN POST TRAUMATIC STRESS DISORDERS OF THE VIETNAM VETERAN: OBSERVATIONS AND RECOMMENDATIONS FOR THE PSYCHOLOGICAL TREATMENT OF THE VETERAN AND HIS FAMILY (Tom Williams ed., 1980). For a discussion of how World War II and Vietnam veterans experience PTSD, see John C. Nemiah, A Few Intrusive Thoughts on Posttraumatic Stress Disorder, 152 AM. J. PSYCHIATRY 501, 501 (1995). Nemiah refers to a study that shows that stable family backgrounds can make a difference in how men respond to traumatic experiences. Id. at 502; see also Irving M. Allen, Posttraumatic Stress Disorder Among Black Vietnam Veterans, 37 HOSP. & COMMUNITY PSYCHIATRY 55, 55 (1986); Patricia A. White & William O. Faustman, PTSD in Minorities, 40 HOSP. & COMMUNITY PSYCHIATRY 86, 87 (1989) (indicating that black veterans with PTSD received more neuroleptics than other groups). African-American veterans have been
relational trauma), can also trigger PTSD. Examples of stressors include: natural disasters such as earthquakes, fires and tornados; human-induced disasters like wars, bombings, and riots; and accidental disasters like car found to have a significantly higher rate of PTSD. See Erwin V. Parson, Post-Traumatic Psychocultural Therapy (PTPsyCT): Integration of Trauma and Shattering Social Labels of the Self, 20 J. CONTEMP. PSYCHOTHERAPY 237, 238 (1990).

24. See NATIONAL VICTIM CENTER AND CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION (1992). The Women's Study, which was a three year project surveying over 4000 adult American women, found that rape victims were 6.2 times more likely than nonvictims to experience PTSD. Id. at 7. Rape Trauma Syndrome is considered a type of PTSD. This disorder is divided into two phases. During phase I or the "acute phase," the woman may react by crying and sobbing uncontrollably. She may also be very tense or uncharacteristically calm or controlled. The victim may experience sleep deprivation, headaches or other physical problems. At phase II, known as the long-term reorganization process, she may have nightmares and other phobic reactions. ANN WOLBERT BUROESS & LYNDA L. HOLMSTROM, RAPE TRAUMA SYNDROME IN FORCIBLE RAPE: THE CRIMB, THE VICTIM, THE OFFENDER 315 (1977); see also Gail E. Wyatt, The Sociological Context of African-American and White American Women's Rape, 48 J. SOC. ISSUE 77, 87 (1992) (discussing how both black and white women experience Rape Trauma Syndrome).

25. For a discussion of the clinical treatment of a black woman suffering PTSD after the murder of her mother, see G. Evelyn LeSure, Post-Traumatic Stress Disorder: The Case of Mary, 3 CASE ANALYSIS SOC. SCI. & SOC. THERAPY 1 (1992). One study listed race as a risk factor in experiencing PTSD. See Naomi Breslau et. al., Risk Factors for PTSD-Related Traumatic Events: A Prospective Analysis, 152 AM. J. PSYCHIATRY 529 (1995). The authors concluded that among adults, "[t]hose with less education, blacks ... are more likely than others to be exposed to traumatic events and are at greater risk for PTSD." Id.

26. For a discussion concerning women experiencing PTSD because of sexual harassment, see JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 32 (1992), and Jennifer L. Vingiguerre, Note, The Present State of Sexual Harassment Law Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women, 42 CLEV. ST. L. REV. 301 (1994). Herman discusses the rape victim's symptoms that are similar to those experienced by war veterans. Judith Lewia Herman, Sequelae of Prolonged and Repeated Trauma: Evidence for a Complex Post-Traumatic Stress Syndrome (DESNOS), in POSTTRAUMATIC STRESS DISORDER: DSMIV AND BEYOND 213 (Jonathan R.T. Davidson & Edna B. Foa eds., 1993). Herman suggests that there is evidence for a more sophisticated type of PTSD based on prolonged repeated interpersonal violence or victimization. Id.


29. For a discussion of the impact of danger on children living in a war zone including violent neighborhoods, see James Garbarino et. al., What Children Can Tell Us About Living in Danger, 46 AM. PSYCHOLOGIST 376, 376 (1991). The authors note that
Humans who are exposed to traumatic events in any of the above forms have biological and psychological reactions. With immediate stress, the brain releases adrenalin and the body undergoes physiological changes in order to cope (i.e., increased heart rate, constricted blood vessels). Psychologically, persons diagnosed with PTSD exhibit symptoms long after the initial traumatic event. Cognitive disturbances, high arousal symptoms, and high avoidance symptoms are typical.

Vietnam veterans have used expert testimony on PTSD in trials to explain their actions. As a result of nearly twenty years of advocacy, courts have also accepted battered woman syndrome as scientific evidence and therefore have admitted it at trial.

Doctor Lenore Walker is credited with recognizing the phenomenon called battered woman syndrome as a type of post-traumatic stress disorder. She is among those who believe that many battered women,

"[c]hronic danger imposes a requirement for developmental adjustment-accommodations that are likely to include persistent PTSD." Id. at 377.

30. In the aftermath of the Los Angeles riot following the verdict in the People v. Powell (Rodney King) case in 1992, many Korean business persons were diagnosed as suffering from PTSD. See Angela Oh, Race Relations in Los Angeles: "Divide and Conquer" Is Alive and Flourishing, 66 S. Cal. L. Rev. 1647, 1649 n.9 (1993).

31. See Nancy Kaser-Boyd & Steven R. Balash, Battered Women in the Courtroom, in AMERICAN BAR ASSOCIATION DEFENDING BATTERED WOMEN IN CRIMINAL CASES 4 (Linda L. Ammons & Mario Conte eds., 1993).

32. A traumatized person's world view is subject to change. Kaser-Boyd & Balash state that "[i]ndividuals who have experienced a significant threat to their safety (good examples for the jury are a serious car accident where they thought they might die or robbery at gunpoint) . . . no longer entertain a belief in their own invulnerability or in a 'safe world.'" Id.; see Lenore E.A. Walker, Battered Women Syndrome and Self-Defense, 6 NOTRE DAME J. ETHICS & PUB. POL'Y 321, 327 (1992). The chronically traumatized have been described as hypervigilant, anxious and agitated. See Elaine Hilberman, Overview: The Wife-beater's Wife Reconsidered, 137 AM. J. PSYCHIATRY 1336, 1341 (1980). Tension headaches, gastrointestinal disturbances, abdominal, back and pelvic pain are common symptoms experienced by abused persons. See HERMAN, supra note 26, at 216.


misdiagnosed as having serious personality disorders, were actually experiencing PTSD. Her research was based on a study of 403 self-identified women in a six-state area. Walker states that the interviewees were a mixed group, representing all ages, races, religions, and socioeconomic groups. Walker listed the following common traits and/or attitudes of the surveyed group:

1. Has low self-esteem.
2. Believes all the myths about battering relationships.
3. Is a traditionalist about the home, strongly believes in family unity and the prescribed feminine sex-role stereotype.
4. Accepts responsibility for the batterer’s actions.
5. Suffers from guilt, yet denies the terror and anger she feels.
6. Presents a passive face to the world but has the strength to manipulate her environment enough to prevent further violence and being killed.
8. Uses sex as a way to establish intimacy.
9. Believes that no one will be able to help her resolve her predicament except herself.

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Organization's International Classification of Diseases.

37. See WALKER, supra note 35, at 31.
38. Id.
Battering can be physical, psychological, or sexual. Some persons who have been battered and suffer from PTSD experience learned helplessness. Martin Seligman, an experimental psychologist, developed the learned helplessness theory based on his experiments with dogs. His hypothesis was that dogs subjected to negative reinforcement could learn that their voluntary behavior had no effect on controlling what happened to them. As an aversive stimulus was repeated, the dog's motivation to respond would lessen. Walker adopted Seligman's concept to explain one aspect of the battering phenomenon between husbands and wives.

According to Walker, learned helplessness has three basic components: information about what will happen; thinking or cognitive representations about what will happen (learning, expectation, belief, perception); and behavior toward what does happen. Walker states that, in the second component (cognitive representations), victims experience faulty expectations that response and outcomes are independent. Therefore, despite the fact that the person actually has control over response-outcomes, she will not exercise that control. In other words, she will give up because of the belief that the situation is hopeless. Learned helplessness may be one reason why some battered women do not leave their abusers.


40. Amnesty International has defined psychological abuse in conjunction with hostages. An eight-part definition that has been adopted by Walker includes: isolation of the victim; induced debility producing exhaustion; monopolization of perceptions, including obsessiveness and possessiveness; threat, such as death to self, family or friends or sham executions; degradation including humiliation, denial of victim's power, and verbal name calling; drug or alcohol administration; altered states of consciousness through an hypnotic state; and occasional indulgences that keep hope alive that the abuse will cease. See Mary Ann Douglas, The Battered Woman Syndrome, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 31 (Daniel Jay Sonkin ed., 1987).

41. Sexual assault is any forced sexual intimacy.

42. See WALKER, supra note 35, at 42.

43. Id. at 45.

44. Id. at 45-46.

45. Id. at 46.

46. Id.

47. Id. at 47-53.

48. Id. at 47.

49. Id.

50. Id.

51. Id. However, the reasons for not leaving an abusive relationship can be as varied as the individuals who are involved. See Tracy Herbert et. al., Coping with an
Walker also describes a pattern or cycle of violence that occurs in battering relationships. There is the tension building stage where the batterer is agitated, the explosive stage when the beatings take place, and the cooling-off or honeymoon stage, where the abuser is repentant and seeks to woo his lover by being romantic.

During the late 1970's, lawyers began to petition courts to hear Walker's theory. In 1978, Beverly Hodge Ibn-Tamas, an African-American woman, appealed her second-degree murder conviction for killing her abusive husband. The trial court would not allow Lenore Walker's testimony on battered women. The D.C. Circuit Court of Appeals ruled that the trial court erred in not admitting the evidence. Although the conviction was not overturned, this landmark decision

Abusive Relationship: How and Why Do Women Stay?, 53 J. MARRIAGE & FAM. 311, 319 (1991) (discussing study that showed that 50% of women who were currently involved with abusers left and returned on at least one previous occasion). The lack of support services and shelters for battered women, fear of losing their children, familial pressures to stay in the relationship, few or no fiscal resources, fear of being stalked and harmed by their abusers, and, lastly, the women's desire to make the relationships work because they love their partners, are all explanations for why women stay and/or return. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1 (1991).

While some battered women may live in constant fear, battering is not always the sum total of their relationships. I was in the audience at a conference where a black woman stood up and explained through tears the depth of love and emotion invested in her marriage. She further said that she stayed with her abuser because she wanted her children to know who their father was because she had not known her father. She told us that she knew she had to leave when she woke up one night and found her bed soaked in lighter fluid. Her husband had planned to set her on fire.

Even when women do finally break off the relationship, statistics show that separation does not necessarily end the abuse. A Justice Department report found that more than 70% of the battering incidents occurred after the liaison had ended. See U.S. JUSTICE DEP'T, U.S. CRIME SURVEY (1990). Finally, one should not ignore the possibility that decision making by the battered woman or any other person subjected to systematic violence can be stunted or impaired by the physical and/or psychological torture which is designed to reinforce her helplessness.

52. See Walker, supra note 35, at 55-70.
53. Id.
54. Daria Ibn-Tamas, Beverly Hodge's daughter, told me that many people do not realize that her mother is black. She also told me that her mother stayed with her father because of pressure from significant others. Her father, Robert (Gamble) Ibn-Tamas, was a middle-class black neurosurgeon, and Beverly felt that to leave would be scandalous. Both Robert and Beverly had been married before and Beverly did not want to have a failed second marriage. Interview with Daria Ibn-Tamas, in Washington, D.C. (June 15, 1995).
56. Id. at 631.
57. Id. at 635.
signaled to litigants and advocates that the federal courts might consider battered woman syndrome testimony admissible.

Walker cites the trial of another African-American woman as the actual precedent for federal courts admitting testimony on battering.\textsuperscript{58} Mary Player is an African-American woman who shot and killed her husband at the Camp Pendleton Marine base in California.\textsuperscript{59} Player’s trial was held in federal court and her attorney utilized the assistance of Walker and Lynne Bravo Rosewater, a psychologist.\textsuperscript{60} Although Player was convicted, Walker believes that her testimony was instrumental in Player receiving a mitigated sentence.\textsuperscript{61}

Feminist lawyers and scholars have criticized Walker’s theory because they claim that the explanations for why women stay in abusive relationships are more multifaceted than that women are simply suffering from a “syndrome.”\textsuperscript{62} Some fear that using battered woman syndrome testimony is gender-stereotyping that results in stigma more harmful than “any perceived benefit,”\textsuperscript{63} and that if a woman who kills her abuser does not fit a “classic” profile, juries will convict, despite the fact that the defendant had a legitimate claim of self-defense.\textsuperscript{64} The “essentialist”\textsuperscript{65}

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\item \textsuperscript{58} See Walker, supra note 32, at 300.
\item \textsuperscript{59} Id. at 296.
\item \textsuperscript{60} Id. at 298.
\item \textsuperscript{61} Player was convicted of second-degree murder, but sentenced to less than one year. Another African-American woman, Kathy Thomas, tried to have battered woman syndrome testimony introduced in her trial, and in 1981, the Ohio Supreme Court rejected the admission of such testimony. State v. Thomas, 423 N.E.2d 137 (1981). The court has since reversed its opinion on the scientific validity of the expert testimony. Koss v. State, 551 N.E.2d 970 (Ohio 1990).
\item \textsuperscript{62} See discussion supra note 51; see also Michael Dowd, Dispelling the Myths About the “Battered Woman’s Defense”: Towards a New Understanding, 19 FORDHAM URB. L.J. 567 (1992); Deborah Kochan, Comment, Beyond the Battered Woman Syndrome: An Argument for Development of New Standards and the Incorporation of a Feminine Approach to Ethics, 1 HASTINGS WOMEN’S L.J. 89 (1989). Dowd explains how a battered woman fits the mold:

“Good” battered women are passive, loyal housewives, acting as loving companions to their abusers. These women must have flawless characters and continually appeal to the police and courts for help, regardless of the futility of their efforts. By contrast, the “bad” battered woman is one who fails to possess any of the virtues of the “good” woman, and who may have even obtained an education and pursued a career.

Id. at 581.
\item \textsuperscript{63} See Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1, 70 (1994) (arguing that the battered woman syndrome “is a product of patriarchal research”); Deborah W. Denno, Gender, Crime and the Criminal Law Defenses, 85 J. CRIM. L. & CRIMINOLOGY 80, 85 (1994).
\item \textsuperscript{64} See Schneider, supra note 8, at 216.
\end{itemize}
battered woman profile is a white, middle class, passive, weak woman who, in a moment of terror, lost control and committed a crime because she was being abused. If there is an acceptable battered woman type whose circumstance is more defendable than others, how does this attitude affect the trials of other battered women who may arguably be in the same position as the classic battered woman but who do not mirror the same physical or sociological characteristics? In particular, what about African-American women?

65. Essentialism, in feminist jurisprudential parlance, refers to treating all women as if there were alike, sharing a common essence. Postmodern feminist scholars believe that traditional feminist scholarship has been flawed because it fails to account for the differences among women based on race, sex, and sexual orientation. The criticism is that feminist theory is essentialist, or creates a universal woman who does not exist and therefore by operation the theory does not analyze the other socio-economic factors. This shortsightedness excludes the experiences of women who are not white, middle class, and Western European. See BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); Elizabeth Spelman, THE INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988). For an explanation of how essentialism works on three levels in the legal system, see RUTH COLKER, PRONANT MEN: PRACTICE, THEORY AND THE LAW 90 (1994). Colker states:

The court itself can be essentialist in not seeing the full range of the impact of a statute on all women or worse yet, seeing that full range but not caring about it for a subgroup of women. Essentialism develops in reading court opinions if we do not look beyond the court’s own description of the impact of its ruling. Finally, as lawyers we can be essentialist in our arguments to courts if we use the word women in a way that is not inclusive of all women’s lives.

Women in America are violated by their current or former partners at such an alarming rate that domestic violence is considered epidemic.\textsuperscript{66} Annually, women, as compared to men, experience over ten times as many incidents of violence by an intimate.\textsuperscript{67} According to the National Institute of Health, in the mid-1980s homicide was the leading cause of death among African-Americans.\textsuperscript{68} Some studies indicate that black women rank second in the frequency of arrests for murder.\textsuperscript{69} The typical victim of a black female who kills is a black male with whom she had a relationship.\textsuperscript{70}


For a discussion of the use of the Index of Spouse Abuse and black women see Doris Williams Campbell et al., \textit{The Reliability and Factor Structure of the Index of Spouse Abuse with African-American Women}, 9 VIOLENCE & VICTIMS 259 (1994). This instrument is a questionnaire that was developed to measure violence between intimates. Campbell's thesis is that because diverse groups were not represented in the initial sampling, testers must be careful in using the ISA with minority groups. Campbell's study involved 504 African-American women and found the ISA useful but limited. \textit{Id.} at 271.

The first government agency to keep records on abuses to black women by their spouses may have been the Freedman's Bureau. See ERIC FRONNER, \textit{RECONSTRUCTION AMERICA'S UNFINISHED REVOLUTION}, 1863-1877 (1988). The Bureau had hundreds of complaints by black women of "beatings, infidelity and lack of child support." \textit{Id.} at 88.

\textsuperscript{67} \textit{See \textit{Bureau of Justice Statistics, U.S. Dep't of Justice, Violence Against Women 6} (1994). Women are twice as likely to be murder victims as opposed to murder offenders. See Peter J. Benekos, \textit{Women As Victims and Perpetrators of Murder, in Women Law & Social Control} 219, 220 (Alida V. Merlo & Jocelyn M. Pollock eds., 1995) (citing Justice Department figures over an eight year period).


\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{See Paula D. McClain, Black Female Homicide Offenders and Victims: Are They from the Same Population?}, 6 DEATH EDUC. 265, 276 (1982); see also Coramae
Until recently, the public, criminal justice agencies, and the courts have ignored the plight of the battered woman. 71 Battered women are not believed either because society has historically been in denial about the terrorism that occurs in the home, or because abused women who do not leave their partners are thought to be lying about the seriousness of the abuse they suffered. Black women face similar hurdles, but additionally they must overcome the presumption that their race predisposes them to engage in and enjoy violence. 72 "[P]olice trainees

Richey Mann, Black Female Homicide in the United States, 5 J. INTERPERSONAL VIOLENCE 176 (1990) (stating that black women in a study were more likely to kill as a result of victim precipitation). When white women commit homicide they also typically kill white men, usually an intimate partner.

71. See Ammons, supra note 6, at 61-74.

72. See Rosemarie Tong, Black Perspective on Women, Sex, and the Law, in WOMEN, SEX AND THE LAW 153 (1984). Tong talks about the myths that teach that people of color are inherently more violent than whites. For a critique of how studies on domestic violence and race have been flawed, see MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK AND IN THE COMMUNITY 51-54 (1994). According to sociologist Andrew Hacker, the nation's preoccupation with crime has racial overtones. See ANDREW HACKER, TWO NATIONS, BLACK AND WHITE: SEPARATE, HOSTILE, UNEQUAL 179 (1992). The Willie Horton bogeyman is one example of how the bad acts of one criminal can be used as a symbol—much like the images in Griffith's Birth of a Nation were used to stir up the fears and passions of whites. Id. at 180. Black crime is typically characterized as violent crime: murder, rape, or robbery. Id. Statistics that suggest that violence is a phenomenon primarily in minority communities are skewed. See Evan Stark, Rethinking Homicide: Violence, Race and the Politics of Gender, 20 INT J. HEALTH SCI. 3 (1990). Stark states:

[although homicide deaths and violence-related arrests are significantly higher among blacks than whites, even when the data are controlled for social class, the overall difference in violence among blacks and whites is very slight and is declining, suggesting the weakness of race-specific explanations for violence or of data that focus on outcomes (such as death or arrest) rather than criminal acts.

Id. at 4.

Other experts on intra-family violence have noted that battering among the more privileged is hidden. "We suggest that altercations among the poor are simply more likely to become police matters . . . lower class people are denied privacy for their quarrels . . . The privacy of the middle-class life-style preserves an illusion of greater domestic tranquility: but it is apparently, only an illusion." See Sue E. Eisenberg & Patricia L. Micklow, The Assailed Wife: “Catch 22” Revisited, 3 WOMEN’S L. REV. 138 (1977) (citing Rodney Stark & James McEvoy III, Middle-Class Violence, PSYCHOL. TODAY, Nov. 1970, at 52-54). A study on household crowding and domestic homicide showed that there were no significant differences between black and white domestic homicide. See Brandon S. Centerwall, Race, Socioeconomic Status, and Domestic Homicide, Atlanta, 1971-72, 74 AM. J. PUB. HEALTH 813, 814 (1984).

Even those who prosecute lawbreakers are not beyond violence. A New Jersey prosecutor dating a colleague from the office severely beat her at a private club. See In
are frequently told that physical violence is an acceptable part of life among "ghetto residents." In other words, blacks are "normal primitives," or violence-prone. African-American women who are battered face unique challenges in getting relief and support. For example, when black women are treated for domestic violence related injuries in inner-city hospitals, protocols for wife beating are "rarely, introduced or followed." Trusting health-care providers with their stories of abuse is difficult because black women have often felt that systems do not have their best interests at heart. However, when the provider is sensitive to their needs they will reveal their stories of

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73. See Tong, supra note 72.

74. See Darnel Hawkins, Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Violence Among Blacks, in VIOLENCE IN THE BLACK FAMILY, supra note 68, at 189, 190, 196-97 (discussing the normal primitive beliefs of Swigert and Farrell and how these beliefs translate into the devaluation of black life in the criminal justice system); see also ALVIN F. POUSSAINT, WHY BLACKS KILL BLACKS (1972); NATIONAL CONF. OF STATE TRIAL JUDGES OF THE JUD. ADMIN. DIVISION OF THE ABA & THE NAT'L JUD. COLLEGE, THE JUDGE'S BOOK 113 (1993) [hereinafter JUDGE'S BOOK]. Court officials presume violence is a norm. Id.

75. See infra text accompanying notes 82-115; see also The Violence Against Women Act, 42 U.S.C.S. § 1973 (1994) [hereinafter Women's Act]. As part of the 1994 Omnibus crime bill, Congress passed this law to deal with the problem of partner abuse. Over a six year period, $1.6 billion has been appropriated to assist battered women. See Shalala, supra note 66, at 31.

Crenshaw and others have commented on how violence against women was considered insignificant because of a perception that these crimes were limited to people of color, and not until there was a recognition that the abused could be their sisters, wives and mothers did Congress become interested in outlawing domestic violence. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity, Politics and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1260-61 (1991); see also David Frazee, An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act, 1 MICH. J. GENDER & L. 163, 230 (1993) (discussing the absence of a discussion of race in the Senate hearings on the bill). Frazee does mention a reference to the impact of the legislation on Native Americans. Id.

abuse. Julie Blackman, a psychologist, illustrated how the mental health system deals with black and white women in abusive relationships by contrasting the Hedda Nussbaum-Joel Steinberg case with that of Frances and Herman McMillian. Nussbaum was the battered lover of Steinberg. Lisa, Steinberg’s daughter, was also abused. When Lisa was killed in a battering episode, Nussbaum turned state’s evidence against her lover. Steinberg was convicted of manslaughter in the first degree, and sentenced to a maximum term of eight and one-third to twenty-five years. Nussbaum was never charged and was given the psychiatric and social services support she needed.

On the other hand, Frances McMillian, a poor black woman who was arrested for endangering the welfare of her children, was denied treatment by the same facilities. McMillian and her nine children lived in a two-room apartment in the Bronx with an abusive husband and father, Herman McMillian. The family was discovered because of a fire. When Blackman attempted to get Mrs. McMillian admitted to the treatment facilities that had treated Nussbaum, they would not accept her. Blackman says:

I tried repeatedly to reach the psychiatrist who had been most directly involved in Hedda’s treatment. Hedda’s lawyer encouraged him to take Frances and reminded him that he ought not exclude Frances just because she was Black. I never did speak to Hedda’s psychiatrist about Frances, but his treatment facility decided to reject her anyway.

The district attorney took nine misdemeanor counts to a grand jury even though he was “sympathetic to her condition.” McMillian was indicted. Battered African-American women are also particularly vulnerable because of the lack or the underutilization of resources. For example,

77. See Stephan J. Simurda, Profile: Byllye Avery, Shooting Star, A Crusader for Black Women’s Health, 12 AM. HEALTH 28 (1993); see also Abbey B. Berenson et al., Drug Abuse and Other Risk Factors for Physical Abuse in Pregnancy Among White Non-Hispanic, Black and Hispanic Women, 164 AM. J. OBSTETRICS & GYNECOLOGY 1491, 1493 (1991) (discussing study which showed that white non-Hispanic women were more likely to report previous battering than blacks or Hispanics).

78. See Julie Blackman, Emerging Images of Severely Battered Women and the Criminal Justice System, 8 BEHAV. SCI. & L. 121 (1990).

79. Id. at 125 n.1.

80. Id.

81. Id.

82. See Crenshaw, supra note 75, at 1245-51. Crenshaw points out that women of color are less able to depend on friends and family for support because these persons
African-American women hesitate to seek help from shelters because they believe that shelters are for white women. Because the shelters are associated with the women’s movement, and many black women are estranged from women’s politics, they may feel that only white women’s interests are served in the shelters. African-American women are not totally mistaken in this assumption. A study of the shelter movement in America led a researcher to conclude that black women are ignored in the policymaking, planning and implementation of shelter services. The lack of community outreach in black neighborhoods by the shelters also contributes to the perception that the safe havens are not for women of color. Finally, black women have found the shelter environment inhospitable to their cultural differences.

When leaving shelters, black women are more likely to need health care, material goods and help with their children. A National Institute of Health funded study of sixty battered African-American women over an eight month period found that black women remained in shelters for a significantly longer time than their white counterparts before they could get the necessary resources to start over. Racism also affected the ability of some black women to leave. For example, African-American women would be quoted an apartment rental price over the phone, only to have that price raised when the landlord met the women. White social service personnel would sometimes patronize, ignore or exhibit hostility toward black women.

African-American women depend on informal networks and seek support through prayer, personal spirituality, and the clergy. The African-American church is a traditional source of strength.
(typically male), are a central authority figure in many black communities. However, misinformed ministers may overemphasize the value placed on suffering as a test from God. Further, some clergy have misconstrued biblical principles of love, forgiveness and submission to reinforce sexism and subordination which can be used to justify abuse. Black female parishioners are often told from the pulpit to protect the black male because he is an endangered species.

The inconsistency of police intervention and the lack of other community resources, including hospitals, contribute to the acuteness of violence in African-American neighborhoods. Black women may have to resort to more extreme violence to resolve a battering situation because the police are not interested. African-American women have no historical basis for believing that the world is just and fair and therefore traditional institutions are viewed with great skepticism. Professionals who work with black, battered women provide a unique perspective on

91. See Koss ET AL., supra note 72, at 54.
92. Police departments have been criticized for their lack of vigor in responding to domestic violence episodes. Studies reveal police cover-ups and up to 40% of officers in a police department reported physical aggression toward their spouses. See Sylvia I. Mignon & William M. Holmes, Police Response to Mandatory Arrest Laws, 41 CRIME & DELINQUENCY 430, 431 (1993); Peter H. Neidig et al., Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation, 15 POLICE STUDIES 30 (1992). When the police are called to intervene in black domestic disputes, often the woman is not effectively protected. See Hawkins, supra note 74, at 199-200.

One example of the indifference and racist attitudes of a police officer dealing with a black family incident became an issue in the Rodney King police brutality case. King had been speeding on a Los Angeles freeway and was pursued by Los Angeles police. The first trial of the four police officers charged with state crimes ended in acquittals. These verdicts sparked riots in several Los Angeles communities. Officer Laurence Powell, one of the officers later convicted in federal court of violating the civil rights of Rodney King, had referred to the domestic violence call at a black family's home as something out of Gorillas in the Mist. See Judge Bars Evidence in King Beating Case, WASH. TIMES, Nov. 14, 1992, at A2. Powell made this statement on a police computer shortly before the apprehension, brutal beating, and arrest of Rodney King. Federal prosecutors had hoped to get Powell’s statement admitted as evidence in the federal trial. However, although district court Judge John G. Davies ruled that the statement was "clearly a statement with race and racist content," the judge ruled that the comment was irrelevant. Id.

African-Americans in abusive relationships are not the only persons called gorillas. Middle-class law professors can find themselves faced with such an insult. See Jennifer M. Russell, On Being a Gorilla in Your Midst, or the Life of One Blackwoman in the Legal Academy, 28 HARV. C.R.-C.L. L. REV. 259 (1993). Russell relays her experience of having come back from maternity leave to find a picture of a gorilla in her mailbox. Id. at 260.

93. See Wyatt, supra note 24, at 88.
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how race affects the issue. Kenyari Bellfield, a shelter worker, describes the predicament of battered African-American women:

[A]long with the actual experience of psychological and physical abuse, women of color suffer from the complex phenomenon of racism. The translation of racial oppression to women of color who are battered stems from the basic assumption that people of color are inherently more violent. For a woman of color who is battered, an overwhelming sense of hopelessness and low self-esteem are the result. The effects of racism and sexism seem too great to tackle in the face of having been victimized by a loved one. The very system which has historically served to subjugate and oppress her is the only system which can save her from the immediate abusive situation. 

Cooperating with authorities in prosecuting her abuser could result in community abandonment or scorn because of the perception that black men are selectively penalized. Further, black battered women may connect the physical abuse with racism. Some feel that they become the object of their partner's rage triggered by the persistent maltreatment of black males by the greater society, and therefore the abuser is less

95. Id. at 520-21.
96. See Barbara Hart, Battered Women and the Criminal Justice System, 36 AM. BEHAV. SCIENTIST 624, 628 (1993); Nathaniel R. Jones, For Black Males and American Society—The Unbalanced Scales of Justice: A Costly Disconnect, 23 CAP. U. L. REV. 1 (1994). The African-American community often debates the tension between having the guilty punished and its fear of racism in the justice system. See, e.g., Darci E. Burrell, Recent Developments: Myth, Stereotype, and the Rape of Black Women, 4 UCLA WOMEN'S L.J. 87 (1993) (discussing the Mike Tyson rape of Desiree Washington). Pressures by the family and/or community to avoid involving the police, because of the historical distrust of law enforcement, deter black women from seeking outside help. See Crenshaw, supra note 75, at 1257. African-American women are afraid that police will either brutalize them or their abusing partners. See Don Jackson, Police Embody Racism to My People, N.Y. TIMES, Jan. 23, 1989, at 25A. Jackson, a sergeant on a California police force, set up a sting operation to catch cops brutalizing blacks. He used himself as a target, and a KNBC-TV news team recorded Long Beach California cops shoving Jackson's head through a plate glass window during an arrest. Id. Jackson then wrote, "The black American finds that the most prominent reminder of his second-class citizenship are the police. . . . Operating free of constitutional limitations, the police have long been the greatest nemesis of blacks, irrespective of whether we are complying with the law or not." Id.
culpable. Novelist Alice Walker describes the motivation and rationalization of an abusive male character in her work, *The Third Life of Grange Copeland*.

His crushed pride, his battered ego, made him drive Mem away from school teaching... It was his rage at himself, and his life and his world that made him beat her for an imaginary attraction she aroused in other men, crackers, although she was not a party to any of it. His rage and his anger and his frustration ruled. His rage could and did blame everything, everything on her.

The loyalty trap affects the ability of black women to seek protection and effective counseling. For example, African-American women do not feel comfortable discussing their problems in integrated settings. The fear is that disclosure in some way may hurt the community. Therefore the prohibition against airing dirty laundry becomes more important than healing. Emma Jordan Coleman describes the dilemma abused black women face as a "Hobbesian choice..."

97. See Coley & Beckett, supra note 83, at 486. I have witnessed heated discussions among African-American women who are torn over the issue of whether jail is the appropriate sanction for black men who abuse since a disproportionate number of black men are already imprisoned. One African-American female judge who resides in a predominantly black suburb of Cleveland told an audience that she does not have any reservations about penalizing batterers, especially when they are repeaters. In my opinion, one concern should not cancel out the legitimacy of the other. Sacrificing the lives and health of black women is not the appropriate response to the inequities of the criminal justice system.


99. Id. at 55.

100. The question of loyalty to the race has often been used to discourage black women from asserting themselves in their quest for equal treatment as women. See Pauli Murray, *The Liberation of Black Women*, in VOICES OF THE NEW FEMINISM 87, 96 (Mary Lou Thompson ed., 1970). Murray, an African-American female lawyer, was among the founding members of the National Organization for Women.

The Million Man March on Washington organized by Louis Farrakahn and the Reverend Ben Chavis, formerly of the NAACP, placed black women in the awkward position of having to defend black men's desire to come together and bond or atone. Many black women and men were critical of the sponsor's original request that black women stay at home and take care of the children. Donna Franklin, *Black Herstory*, N.Y. TIMES, Oct. 18, 1995, at A17.

101. For a discussion on how the survival instinct also contributes to black women hiding their pain, see Cathaleen Gray & Shirley Bryant, *Are We So Different? A Dialogue Between An African-American and a White Social Worker*, in SKIN DEEP, BLACK WOMEN AND WHITE WOMEN WRITE ABOUT RACE (Martia Golden & Susan Richards Shreve eds., 1995) [hereinafter SKIN DEEP].
between claiming individual protection as a member of her gender and race or contributing to the collective stigma upon her race if she decides to report the ... misdeeds of a black man to white authority figures." 102

The justice system has not rushed to protect black women who have been beaten. 103 Analogies to rape 104 and other gender discriminatory


103. See Tong, supra note 72, at 171. Tong states, "[e]ven though it is true that arrest has traditionally been used as an 'establishment tool against minorities,' it is unlikely that police officers, prosecutors, and judges will rush to the defense of black women who have been beaten by black men." Id. The protection of women's rights has been contingent on the woman's skin color. See Wyatt, supra note 24, at 88.

104. Since their first contacts with slavetrading, colonizing Europeans, African women have been considered promiscuous, with the sexual appetites of beasts. Therefore, when slave women were raped either by their masters, or by others, there was no protection. Harriet Jacobs, who was known as the slave Linda Brent, wrote about her helplessness in her memoirs:

I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things. My soul revolted against the mean tyranny.

But where could I turn for protection? No matter whether the slave girl be as black as ebony or as fair as her mistress. In either case, there is no shadow of law to protect her from insult, from violence, or even from death; all these are inflicted by fiends who bear the shape of men.


Case law reinforced the notion that slaves had no human rights. In State v. Mann, 13 N.C. 263 (1829), a North Carolina court ruled that the law of battery did not protect a female slave from being shot at and wounded by one who had hired the slave. Id. George v. State, 37 Miss. 316 (1859), held that neither the common law nor statutory enactments (unless slaves were mentioned) would be applied to a case where a slave raped another slave. The court stated, "The crime of rape does not exist in this State between African Slaves." Id.

Black slave women in the South were not the only victims of rape by their masters and overseers. Slaves in the North who resisted sexual assault faced exile to the South. "Women who refused to submit themselves to the brutal desires of their owners are repeatedly whipped to subdue their virtuous repugnance, and in most instances this hellish practice is but too successful—when it fails, the women are frequently sold off to the south." SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS AND AUTOBIOGRAPHIES 221 (John W. Blassingame ed., 1977); see also MELTON A. McLaurin, CELIA: A SLAVE (1991) (detailing story of an African-American slave woman who was executed for defending herself from the rape of her master). Long after slavery had been abolished, in some courts the idea of rape and a black woman was inconceivable. A 1913 Florida Supreme Court decision concerning statutory rape and a chastity requirement implied that, although the law presumes that every female is chaste,
practices illustrate how black female victimization has been and this presumption could not be extended to "another race that is largely unmoral." (i.e., blacks). Dallas v. State, 79 So. 690, 691 (Fla. 1918). Today, black women perceive that society does not believe their claims of rape. See Poussaint, supra note 74, at 73. If her rape charge is taken seriously, there is little outrage.

105. The sexual harassment of black women in the workplace is of historic proportions. Before white women were allowed to enter the commercial labor force black women worked. Their reason for being in the Americas was labor. African-American women have been vulnerable to sexual indignities in the workplace because of their low status and the perception that they are sexually accessible. See Catharine A. MacKinnon, Sexual Harassment of Working Women 53 (1979). Domestic workers were most vulnerable. In her autobiography, Fannie Barrier Williams talks about the letters she received from black women in the South trying to relocate their daughters North. She says:

It is a significant and shameful fact that I am constantly in receipt of letters from the still unprotected colored women of the South begging me to find employment for their daughters according to their ability, as domestics or otherwise to save them from going into the homes of the South as servants, as there is nothing to save them from dishonor and degradation. Many prominent white women and ministers will verify this statement . . . . Their own mothers cannot protect them and white women will not, or do not.


In Freedom on My Mind, a documentary on the freedom-riders and the struggle for voting equality, Dr. Endesha Ida Mae Holland tells the story of how in Greenwood, Mississippi, on her eleventh birthday, she was raped by the white man of the house while babysitting. She said:

It was no reason for us to run and tell our mothers or our fathers because they couldn't do anything about it but get killed if they said something about it.

So many times girls . . . would talk in the bathroom about it, never telling our parents, but it happened very, very frequently.

Freedom on My Mind (Clarity Film Production 1994). Dr. Holland later became a part of the voting rights struggle in Mississippi.

Gregory Williams, Dean of the Ohio State University College of Law, has written an autobiography that reveals that for the first 10 years of his life his family passed as white. See Gregory H. Williams, Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black (1995). His paternal grandmother was a black woman and his paternal grandfather, his grandmother's boss. Id. at 62. She was a domestic working for a white family. Id.

Black women in the professional class have not escaped being harassed on the job. During an interview for a medical administrator's position a black woman was asked if it were true that in her neighborhood all the women were prostitutes. Karen Lindsey, Sexual Harassment on the Job and How to Stop It, Ms., Nov. 1977, at 47, 48. After the woman was hired and her white supervisor suggested that she go to bed with him and several of his colleagues, she quit the job. Id.

On the first day of a new job, Maxine Munford was asked if she would make love to a white man. See MacKinnon, supra, at 30. When she was fired, she was told by her employer that she could get her job back if she had intercourse with him seven days a week. Id. Munford sued. See Munford v. James T. Barnes & Co., 441 F. Supp. 459
remains unimportant. White men have had carte blanche access to all women. Heinous crimes have been committed in the name of protecting white womanhood. Interracial sexual or physical assault

(E.D. Mich. 1977). In Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979), a black woman sued her employer because a supervisor demanded sex from a "black chick." Id. at 212. The plaintiff litigated under Title VII and 42 U.S.C. § 1981, alleging sex and race discrimination. Id. The district court dismissed her § 1981 claim and said only the sex discrimination claim could go forward. Id. However, on appeal, the court reinstated her claim of race discrimination. Id.; see also MACKINNON, supra, at 53 (discussing why African-American women initially brought a disproportionate number of sexual harassment lawsuits). Mechelle Vinson, the litigant in the landmark Supreme Court sexual harassment case, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), is an African-American woman.

Black women who have tried to get relief under Title VII because they are black and female have had mixed results. Degraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142 (E.D. Miss. 1976), was the first case to consider whether black women were a protected class under Title VII. The plaintiff sued the company because their last hired, first fired policy that discriminated against black women. The court would not view the plaintiff's claims as two distinct and separate causes of action because the court feared that a super remedy for black women "would give them relief beyond what the drafters of the relevant statutes intended." Id. at 143. However, in Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980), the Fifth Circuit stated that "[r]ecognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females." Id. at 1039. For a further discussion of Title VII and black women, see Cathy Scarborough, Conceptualizing Black Women's Employment Experiences, 98 Yale L.J. 1457 (1989), and Judy Trent Ellis, Sexual Harassment and Race, 8 J. Legis. 30 (1981).

106. Interracial mixing has always been taboo in America, especially between blacks and whites. Until Loving v. Virginia, 388 U.S. 1 (1967), states could prohibit mixed marriages. Although society is more accepting of this practice, many persons still hold the belief that race mixing is unacceptable. For example, Hulond Humphries, a high school principal in Alabama, canceled a prom when he learned that mixed couples were planning to attend. See Ronald Smothers, Vestiges of the Old South: A Fuss in Alabama—Guess Who's Coming to the Prom, N.Y. Times, Mar. 20, 1994, at D2. Humphries also told a black young woman that her parents' marriage (her father was white) and her birth were a mistake. Id.; see also Mixed Race Student to Get Settlement In Prom Dispute, Orlando Sentinel, June 29, 1994, at A12.

When a New York magazine placed an illustration on its cover of a Hasidic Jew and a black woman kissing, the Valentine's Day gesture created a stir. See The New Yorker, Feb. 15, 1993 (cover). In 1958, two African-American boys, ages seven and nine, were sentenced to 12 years in prison when their six year-old white female playmate kissed the older boy on the cheek while playing house. See CONRAD LYNN, THERE IS A FOUNTAIN: THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER 141, 145 (1979). Lynn persuaded Eleanor Roosevelt to become involved and she convinced President Eisenhower to pressure Governor Luther Hodges of North Carolina to release the boys. They were released four months later. Id. at 156.

107. D.W. Griffith's film, Birth of a Nation (based on the book, The Clansman, by Thomas Dixon), celebrated as a cinematic classic, exploited the rape of the white
woman by the savage black man theme. The film is credited with the legitimization of the Ku Klux Klan, as well as the slaughter of numerous blacks, when enraged white men rioted after viewing the picture. For a discussion of the impact of the film, see Craig D'Ooge, The Birth of a Nation: Symposium on Classic Film Discusses Inaccuracies and Virtues, 53 LIBR. CONGRESS INFO. BULL. 263 (1994), and Margaret M. Russell, Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film, in CRITICAL RACE THEORY: THE CUTTING EDGE 56 (Richard Delgado ed., 1995). The Klan was known for raping black women as a tactic to keep voting black men under control. See GERDA LERNER, BLACK WOMAN IN AMERICA: A DOCUMENTARY HISTORY 183-84 (1972).

Rape was considered a capital offense in some jurisdictions. Since 1930, of the 455 men who have been legally executed in the United States for rape, 89% were black. See Furman v. Georgia, 408 U.S. 238, 364 (1971) (Marshall, J., concurring). No rapist has ever been given the death penalty for violating a black woman. Tong, supra note 72, at 168. The Scottsboro Boys case involved nine young black men who were on a train and were accused of raping two young white women. See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1992). This infamous case, which ended in the convictions of all the defendants, has been held up as an example of a travesty of justice. One of the women recanted her story. Id. at 424. Clarence Norris, the last surviving of the Scottsboro boys, who had always maintained his innocence, was pardoned by Alabama Governor George Wallace in October 1976. Id. at 425. The number of illegal (lynching) executions for the real and imagined rape of white women remains unknown. Thousands of black men have been lynched, with the rationale often being the protection of white women from the sexual brutality of black men. Fourteen year old Emmett Till of Chicago paid the ultimate price for whistling at a white woman in Mississippi. He was beaten, shot, and thrown in the Tallahatchie River. The two white men who later admitted to Till's killing were found not guilty by an all-white jury. STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988); see JUAN WILLIAMS, EYES ON THE PRIZE 39-45, 48, 52 (1987).

This type of vigilantism was not uncommon. See Jacquelyn Dowd Hall, The Mind That Burns in Each Body: Women, Rape and Racial Violence, in POWERS OF DESIRE (Ann Snitow et al. eds., 1983) (citing a Dothan, Alabama newspaper announcement which read: "Florida to Burn Negro at Stake: Sex Criminal Seized from Jail—Will Be Mutilated, Set Afire in Extra-Legal Vengeance for Deed"); see also HOWARD KESTER, THE LYNCHING OF CLAUDE NEAL (1934) (quoting member of lynch mob: "After taking the nigger to the woods ... they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it." Id. at 2.

Walter White and the NAACP tried to convince President Franklin D. Roosevelt to support an anti-lynching law in Congress. Roosevelt gave lukewarm support to the idea, but never publicly supported the measure, which was defeated. See TOM H. WATKINS, THE GREAT DEPRESSION: AMERICA IN THE 1930'S, at 223-24, 323 (1993). Journalist Ida B. Wells is credited with reporting the atrocities of vigilante violence. See IDA B. WELLS, CRUSADE FOR JUSTICE, at xxi, 61-67 (Alfreda M. Duster ed., The Univ. of Chicago Press 1970) (1928).

The obsession concerning black men and rape has even convinced some black men that the issue of rape in the black community is about them. When Susan Brownmiller was researching her book, Against Our Will, which dealt with rape, she went to the Harlem Schomburg collection to obtain information on black women and rape. A black male librarian insisted that she begin her topic by examining historic injustice to black men. MICHELE WALLACE, BLACK MACHO AND THE MYTH OF THE SUPERWOMAN 119
(e.g., minority male/white female) still produces outrage that is not comparable to any other kind of inter- or intraracial adult abuse. For example, the same week that the highly-publicized rape of the affluent, white Central Park jogger by several Hispanic and black males took place, twenty-eight other first-degree rapes or attempted rapes took place in New York City. Donald Trump purchased full-page ads in the New York Times, The Daily News, The New York Post, and New York Newsday to denounce the men who had committed the violent acts. Trump spent $85,000 for the advertisements. In response to Trump, black clergy published their own ad, stating that Trump was trying to divide the city into two camps with a thinly veiled polemic. Another article reported that two weeks after the Central Park incident, a thirty-eight year old black woman was forced off a Brooklyn street at knife-point by two men, taken to a rooftop, raped, beaten, and thrown fifty feet to the ground. The woman sustained abdominal injuries, two broken ankles, and a fractured right leg. This attack did not receive the national notice of the Central Park jogger case and there was no ad from Donald Trump. Three men went to prison for the crime.

Assumptions about sexual stratification explain why reactions to sexual assault differ. Criminologist Anthony Walsh provides the following analysis:

1. Women are viewed as the valued and scarce property of the men of their own race.

(1979). Brownmiller was told, “To black people, rape has meant the lynching of the black man.” Id.


111. Terry, supra note 108, at 25.

112. Id.

113. See Robert D. McFadden, Two Men Get 6 to 18 Years for Rape in Brooklyn, N.Y. Times, Oct. 2, 1990, at B1. Two years after the Central Park crime, a black college coed claimed that she was gang-raped by white college males at St. John's University. The mainstream press was criticized for ignoring the story. Some of the young men were acquitted. See HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 219-20 (1992); see also E.R. Shipp, Sex Assault Cases: St. John's Verdict Touches off Debate, N.Y. Times, July 25, 1991, at B1.

2. White women, by virtue of membership in the dominant race, are more valuable than black women.

3. The sexual assault of a white by a black threatens both the white man’s “property rights” and his dominant social position. This dual threat accounts for the strength of the taboo attached to inter-racial sexual assault.

4. A sexual assault by a male of any race upon members of the less valued black race is perceived as nonthreatening to the status quo, and therefore less serious.

5. White men predominate as agents of social control. Therefore they have the power to sanction differently according to the perceived threat to their favored social position.\footnote{113}

In other words, black women’s bodies are not as valuable as their white female counterparts. The history of the devaluation of black women in general provides insight into understanding the circumstances of the battered African-American female. The following discussion on slavery’s legacy provides that context.

II. The African Woman in America

There never was a civilized nation of any other complexion than white . . . . No ingenious manufactures amongst them, no arts, no sciences . . . . Such uniform and constant difference could not happen . . . if nature had not made an original distinction betwixt these breeds of men.\footnote{116}

being alive & being a woman & being colored is a metaphysical dilemma.\footnote{117}

The European slave trade began around 1444 and lasted for 400 years.\footnote{118} When European opportunists visited the African continent

\footnote{115} Id. at 155.
\footnote{116} PHILIP D. CURTIN, THE IMAGE OF AFRICA: BRITISH IDEAS AND ACTION 1780-1850, at 42 (1964) (quoting DAVID HUME, OF NATIONAL CHARACTERS (1754)).
\footnote{117} Ntozake Shange, no more love poems #4, in FOR COLORED GIRLS WHO HAVE CONSIDERED SUICIDE / WHEN THE RAINBOW IS ENUF 48 (1977).
\footnote{118} See LERONE BENNETT, JR., BEFORE THE MAYFLOWER 20 (1962). The relationship between Europe and Africa has a history that predates the slave trade. The ancient African civilizations of Egypt, Ethiopia, and Nubia, among others, were respected, envied, and imitated by western cultures. See JAN PIETERS, WHITE ON BLACK 23 (1992).
they wrote about their impressions of the people they found. These travelers used themselves and their culture as the standard of comparison, and to the extent that Africans were different, they were considered Nubia was located along the Nile from what is now known as Aswan in Egypt to Khartoum in the Sudan. The Nubian civilization consisted of at least six distinct accomplished cultures and lasted longer than either classical Greek or Rome. See David Roberts, Out of Africa: The Superb Artwork of Ancient Nubia, SMITHSONIAN, June 1993, at 90. Roberts writes, “To the ancient Greeks and Romans, Nubia was one of the foremost civilizations of the world. Nubia shimmied with legend. But there was no mistaking the area’s might or wealth.” Id. at 91. According to Pieterse, when Greeks “wanted to represent a far-off, prestigious but different land, they used the black as the sign of differentiation.” PIETERSE, supra, at 23. Pieterse cites Homer, who called Ethiopia the ideal site for the banquet of the gods. Id. at 24.

In the ancient world, color was of little consequence. Pieterse explains that, “generally the world of antiquity . . . was a mixed culture and one in which differences in skin colour did not play a significant role, or rather in which black carried a positive meaning. Id.; see also YOSEF A.A. BEN-JOCHANNAN, BLACK MAN OF THE NILE AND HIS FAMILY (1989); FRANK M. SNOWDEN, JR., BEFORE COLOR PREJUDICE: THE ANCIENT VIEW OF BLACKS (1983).

While early Christian writers like Origen relied on scripture to use the black woman as a symbol of the Christian church, see Snowden, supra, at 102, later western Christian writings began to attribute negative qualities to blackness. See PIETERSE, supra, at 24. “The symbolism of light and darkness was probably derived from astrology, alchemy, Gnosticism and forms of Manichaeism; in itself it had nothing to do with skin colour, but in the course of time it did acquire that connotation.” Id. (citing J.H. PARRY, TRADE AND DOMINION 413 (1973)). “Black became the colour of devil and demons.” Id. The European slave trade made the denigration of color an economic necessity.

Frantz Fanon captures the European attitude toward the black race:

In Europe, the black man is the symbol of Evil. . . . The torturer is the black man, Satan is black, one talks of shadow, when one is dirty one is black—whether one is thinking of physical dirtiness or moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin. In Europe, whether concretely or symbolically, the black man stands for the bad side of the character. As long as one cannot understand this fact one is doomed to talk in circles about the “black problem.” Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone’s reputation and on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light.

FRANTZ FANON, BLACK SKINS, WHITE MASKS 188-89 (1967).

119. Who and what is different depends on the relevant standard of comparison. See Martha Minow, Learning to Live with the Dilemma of Difference: Bilingual and Special Education, LAW & CONTEMP. PROBS., Spring 1985, at 202-06. There are certain legal assumptions made as to what should be considered the “norm” based on the experience and power of those making determinations. See Martha Minow, The Supreme Court 1986 Term, Forward: Justice Engendered, 101 HARV. L. Rev. 10 (1987). Minow explains “women are compared to the unstated norm of men, ‘minority’ races to whites.” Id. at 13.
humanly and culturally deficient. Isabella was the first recorded woman of African descent to arrive on the North American continent. She and nineteen other Africans came ashore at Jamestown, Virginia, in 1619, a year before the Mayflower landing at Plymouth Rock, Massachusetts. Laws protecting the practice of slavery were first codified in 1640 in Massachusetts. The

Audre Lorde describes the mythical norm of the ideal person as white, male, anglo-saxon, protestant. See AUDRE LORDE, SISTER OUTSIDER 116 (1984). The other, the different one, is a question of position and dominance. Minow illustrates this concept when she points out that referring to people of color as minorities is only relevant in some parts of the white western sphere, since the world is primarily populated with colored peoples. See Minow, The Supreme Court 1986 Term, Forward: Justice Engendered, supra, at 13 n.16; see also Derrick Bell, White Superiority in America: Its Legal Legacy, Its Economic Costs, 33 VILL. L. REV. 767 (1988).

Difference in the context of slavery and its economic beneficiaries was important not just because of some intrinsic trait of the slave, but because the institution could be maintained by anchoring the justification of using blacks as perpetual slaves to some inherent deficiency, i.e., color.


121. Id. at 4, 97; see also CURTIN, supra note 116. Curtin discusses how science and pseudo-science were used for nearly 100 years to rationalize how Europeans treated people of color. Id. at 29.

122. BENNETT, supra note 118, at 20. These Africans were not slaves, but indentured servants. See SHARON HARLEY, THE TIMETABLES OF AFRICAN-AMERICAN HISTORY 9 (1995). Africans had travelled to the western hemisphere before. Pedro Alonzo Nino navigated the Santa Maria for Christopher Columbus. Id.


WHEREAS, the plantations and estates of this Province cannot be well and sufficiently managed and brought into use without the labor and service of negroes and other slaves; and forasmuch as the said negroes and other slaves brought unto the people of this Province for that purpose are of barbarous, wild, savage natures, and such renders them wholly unqualified to be governed by the laws, customs and practices of this Province: but that it is absolutely necessary that such other constitutions, law and orders should be in this Province made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity to which they are naturally, prone and inclined . . .

Id. at 121 (citing 7 STATUTES AT LARGE OF SOUTH CAROLINA 352 (McCord) (1840)).

The value of a female slave is illustrated in a New Orleans newspaper advertisement. "Negroes for sale—a Negro Woman, 24 years of age, and her two children . . . Said Negroes will be sold separately or together . . . The woman is a good seamstress. She will be sold for cash or exchange for groceries . . . " A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL
African woman served the role of a commodity producer (i.e., of other slaves) as well as that of a laborer in the field and in her master's


124. The sexual exploitation of black women was unprecedented. Black women were considered breeders, not mothers. Some slavers specialized in selling black children between the ages of 8 and 12. See MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 71-72 (1983). Marable describes the superexploitation of black women as "a permanent feature in American social and economic life." Id. at 70. In his 1744 pseudo-scientific work designed to support slavery based on biological differences, Edward Long, who considered blacks of another species, wrote that black women bore children after brief labor and "practically without pain." See CURTIN, supra note 116, at 43-44 (citing EDWARD LONG, HISTORY OF JAMAICA (1970)). Long, who provided a guide to the British government on its policies in Jamaica, considered blacks "brutish, ignorant, idle, crafty, treacherous, bloody thievish, mistrustful and superstitious." Id.

Barbara Omolade provides an example of a black woman's resistance to a Boston slaveowner who wanted her to be a breeder. "[O]ne source ... tells of a Negro woman being held as a slave on Noodles Island in Boston Harbor. Her master sought to mate her with another Negro, but, the chronicler reported, she kicked her prospective lover out of bed, saying that such behavior was 'beyond her slavery.'" Barbara Omolade, Hearts of Darkness, in POWERS OF DESIRE 354 (Ann Snitow et al. eds., 1983) (quoting CARL DENGLER, OUT OF OUR PAST: FORCES THAT SHAPED MODERN AMERICA 34 (1959)).

The incentive to breed slaves rather than import them had an economic and constitutional dimension. Slaves that produced slaves (property) required less startup capital investment than buying newly-imported slaves. Also, the framers of the Constitution agreed to allow Congress to prohibit the importation of slaves to the United States after 1808. See U.S. CONST. art. I, § 9.
The black woman’s *raison d’etre* was to serve the privileged: white men and women.

**A. Paternalism, Pedestals, and Presumptions: No Mirror Images for African-American Women**

[Their conduct to women always implies that they suppose them to be virtuous and refined; and such is the respect entertained for the moral freedom of the sex that in the presence of a woman the most guarded language is used, lest her ear should be offended by an expression . . . [a]s the Americans can conceive nothing more precious than a woman’s honor . . .

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125. See ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 5 (1983). Davis says: Though Black women enjoyed few of the dubious benefits of the ideology of womanhood, it is sometimes assumed that the typical female slave was a house servant . . . As is so often the case, the reality is actually the diametrical opposite of the myth. Like the majority of slave men, slave women for the most part were field workers.

*Id.* Davis further makes the following statement: "Around the middle of the nineteenth century, seven out of eight slaves, men and women alike, were field workers.* *Id.* (quoting KENNETH M. STampp, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 31 (1956)).

Sojourner Truth (Isabella), one of twelve children, born a slave in 1797 in Hurley, Ulster County, New York, was devoted to abolition and women’s rights. Her famous *Ain’t I a Woman* speech at the 1851 Women’s Rights Convention in Akron, Ohio, was recorded by the Anti-Slavery Bugle. Sojourner makes references to her status and the type of work she has done: "I have as much muscle as any man, and can do as much work as any man. I have plowed and reaped and husked and chopped and mowed, and can any man do more than that?" *NARRATIVE OF SOJOURNER TRUTH* 118 (Margaret Washington ed., 1993); *see also* BELL Hooks, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 23 (1981). Hooks states that even if black women were placed in the homes, this did not mean that they were better treated, "[b]ut they were more likely to suffer endless cruelty and torture because they were constantly in the presence of demanding masters and mistresses. Black females working in close contact with white mistresses were frequently abused for petty offenses." *Id.* at 24. Hooks then quotes an interview with Mungo White, an ex-slave from Alabama who recounts her mother’s treatment by her slaveowner:

> Her task was too hard for any one person. She had to serve as maid to Mr. White’s daughter, cook for all de hands, spin and card four cuts of thread a day, and den wash. Dere was one hundred and forty-four threads to de cut. If she didn’t get all dis done she got fifty lashes dat night.

*Id.*

126. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1 (1889).
Is it not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white the expression of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, and their own judgment in favor of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species.\textsuperscript{127}

The reflections of De Tocqueville and Jefferson cited above illustrate how black and white American women were considered opposites. White womanhood, pure and noble, was to be honored. Black womanhood was something animalistic.\textsuperscript{128} Years later courts would recognize that the attributions of white womanhood were just a device to keep white women in their place. For example, Justice Brennan, writing for the majority in \textit{Frontiero v. Richardson},\textsuperscript{129} found that the "[n]ation's long and
unfortunate history of sex discrimination," which were "[f]irmly rooted in our national consciousness," put women in a cage instead of on the pedestal that Justice Bradley constructed in his concurring opinion in Bradwell v. State. Myra Bradwell sued the state of Illinois because it would not grant her a license to practice law because she was a woman. The Supreme Court upheld that decision and, in addition to finding no violation of the Privileges and Immunities Clause or the Fourteenth Amendment, Justice Bradley issued his famous edict about the role of women in society:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life . . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Neither Justice Bradley’s nor Justice Brennan’s assessment of the role and treatment of women in America captures the condition of African-American women. Black women have never been placed on a pedestal; the cages in which they have been held have been real, not metaphoric. The history of the African woman in America has been one of racial, as well as sexual, discrimination. For the African-American woman, biology and ethnicity were destiny. Her immutable

130. Id. at 684.
131. Id.
132. Id.
133. 83 U.S. 130 (1872) (Bradley, J., concurring).
134. Id. at 141.
135. Biologically-based myths have been used to subordinate black women. The 19th-century craniologists studied the size of the brain and created theories of race and gender superiority based on their pseudoscience. See GLORIA STEINEM, REVOLUTION FROM WITHIN: A BOOK OF SELF-ESTEEM 131-33 (1992). James Hunt, president of the London Anthropological Society in 1863, explained the inferiority of the black woman: “There is no doubt that the Negro’s brain bears a great resemblance to a European female or child’s brain and thus approaches the ape far more than the European, while the Negress approaches the ape still nearer.” Id. at 134 (citing RUTH BLEIER, SCIENCE AND GENDER 49-50 (1984)).
characteristics determined her position in society. Black females learn the importance of immutability at an early age. African-American literature is replete with examples of how looking African is undesirable.

For example, in Toni Morrison's fictional work *The Bluest Eye*, Pecola, a young black girl, thought her miserable life would change if she could have blue eyes. Morrison writes:

136. For equal protection purposes the Court has defined immutability as a characteristic that is determined solely by birth—for example, sex, race, or national origin. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The African-American woman is born with two such factors. The ability to modify those characteristics (e.g., by lightening one's skin or by undergoing a gender reconstruction) does not make them less worthy of constitutional protection. See *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1988), cert. denied, 498 U.S. 957 (1990). Judge Norris of the Ninth Circuit explains:

> At a minimum, . . . the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty. . . . Reading the case law in a more capacious manner, "immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment.

*Id.*

137. See *Michele Wallace, Invisibility Blues* (1990). Michele Wallace, a feminist writer, discusses her own childhood and how her perceptions of what she considered feminine were synonymous with white female characteristics:

> On rainy days my sister and I used to tie the short end of a scarf around our scrawny braids and let the rest of its silken mass trail to our waists. We'd pretend it was hair and that we were some lovely heroine we'd seen in the movies. There was a time when I would have called that wanting to be white, yet the real point of the game was being feminine. Being feminine meant being white to us.

*Id.* at 18.

In the late eighties, Dr. Margaret Spencer, a developmental psychologist at Emory University, replicated the Kenneth B. Clark doll tests among Atlanta, Georgia preschoolers. The children were given two dolls, one white, one black, and asked to choose their preference. The overwhelming majority chose the white doll. See Bill Carter, *Black Americans Hold a TV Mirror Up to Their Life*, N.Y. TIMES, Aug. 27, 1989, at B1. ABC News filmed a documentary entitled *Black in White America*, where in the opening sequence, preschoolers were given pictures of identically dressed children, one black and one white. They were asked to identify "the pretty one, the ugly one, the dirty one, the stupid one." *Id.* One African-American girl pointed to the picture of the black girl and said that she was the "ugly one" because everyone hits her and they don't like her." *Id.* One of the producers, Claudia Pryor, who is a black woman, said that the results of the test deeply disturbed her, but if she had been asked the same questions as a child, "I know I would have picked the white girl. I'm sure I would have wanted the long, straight, blond hair." *Id.*

Long hours she sat looking in the mirror, trying to discover the secret of the ugliness. . . . [If those eyes of hers were different, that is to say, beautiful, she herself would be different . . . Pretty eyes. Pretty blue eyes . . . Each night without fail, she prayed for blue eyes. Fervently . . . she had prayed . . . To have something as wonderful as that happen would take a long, long, time.139

This same theme can also be found in nonfiction works. In her autobiography, Maya Angelou equates being a black child with having a bad dream: "Wouldn't they be surprised when one day I woke out of my black ugly dream, and my real hair, which was long and blond, would take the place of the kinky mass that Momma wouldn't let me straighten?"140

The African-American woman was and continues to be subjected to the triple jeopardy of racism, sexism, and classism.141 These "isms"
are control mechanisms used to subordinate black women.\textsuperscript{142} Since slavery, not only has the social construct\textsuperscript{143} and status\textsuperscript{144} of black and

equal protection framework: (1) Treat black women as a subset of blacks and women and grant their claims the level of protection accorded to the group; (2) Treat black women as a discrete group seeking protection under the Constitution, and assess that group on its own merits to determine the level of protection black women deserve (a type of discrete and insular group); and (3) grant black women a higher standard (even more than strict scrutiny), because of their membership in two disfavored groups (i.e., black and female). \textit{Id.} at 23.

\textsuperscript{142} King, supra note 141, at 47.


Mahoney states, "[e]ven though race has no neutral reality or truth, it has great social force." \textit{Id.} at 1676. The juxtaposition of the black and white female in this culture is an example of using one being to define another. Author Diane Roberts describes this concept as follows: "the understanding of what it means to be a white woman in the United States, particularly in the South, is still largely predicated on what it means to be black." \textit{Diane Roberts, The Myth of Aunt Jemima: Representations of Race and Region} 9 (1994).

W.E.B. DuBois gave a poignant illustration of the differences in perceptions of the status of black women as compared to white women. He recounts an anecdote concerning two white boys having a conversation. Although not explicitly stated, the two boys were apparently in a public place when a black woman crossed their path. The conversation, as recorded by DuBois, is as follows:

"Wait till the lady passes," said a Nashville white boy.

"She's no lady; she's a nigger," answered another.


Often it is assumed that the black woman's experience is synonymous with either the black male or the white woman. However, King and other scholars point out that Black women are often in conflict with the "very same subordinate groups with which we share some interests." \textit{King, supra} note 141, at 52.

\textsuperscript{144} The importance or lack of importance of race and gender depends on the individual's status. Angela Harris explains:

In this society, it is only white people who have the luxury of "having no color;" only white people have been able to imagine that sexism and racism are separate experiences. Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender—of being enmeshed always in the multiple, often contradictory, discourses of sexuality and color. The challenge to black women has been the need to weave the fragments, our many selves, into an integral, though always changing and shifting, whole: a self that is neither "female" or "black", but both .

white women in American been distinguishable, the black woman's

A Ford Foundation study based on the 1980 census indicated that black women earned only 56 cents for every dollar earned by white men. See BUREAU OF NATIONAL AFFAIRS LABOR REPORT, LIKE SEX, RACE AND ETHNICITY DETERMINE WAGES, STUDY FINDS, A2 (Feb. 26, 1987) [hereinafter LABOR REPORT]. This study showed that black women were concentrated in low-paying occupations like domestics and cooks. Id. Black men earned 73 cents to the white man's dollar, and white women earned 63 cents on the dollar. Id. A coalition of 90 organizations representing law associations, labor unions, and women's and civil rights groups urged that wages be raised by 38% for jobs held predominantly by black women in order to pay them for their education and experience at the same rate that white men are compensated. Id.; see also Carol Kleiman, Poverty, Pay Phrases Becomes Focus of Debate, CHI. TRIB., July 27, 1987, at 5; Lee May, Race, Ethnicity, Sex: All Factors in Unequal Wages, Study Finds, L.A. TIMES, Feb. 26, 1987, at 24.

A government commission found that African-American women get negative ratings in the workplace based on stereotypes. See Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital, the Environmental Scan, Mar. 1995, at 71. Interviews with CEOs revealed that black women are perceived as "incompetent / educationally deficient / aggressive / militant / hostile / lazy / sly and untrustworthy." Id.; see also Ella Edmondson Bell & Stella Nkomo, Barriers to Work Place Advancement Experienced by African-Americans: a Monograph Prepared for Glass Ceiling Commission, U.S. Dept. Labor, Mar. 1994, 55-62 (discussing how upward mobility for African-American women is limited and how they must combat various stereotypes). This data confirms what earlier studies had reported. See Mary B. McRae, Sex and Race Bias in Employment Decisions: Black Women Considered, 28 J. EMPLOYMENT COUNSELING 91, 96 (1991). Census Bureau data from 1994 reports that the median black family income in the United States in 1993 was $21,542. See Race and Business, 91 Bus. & Soc. REV. 29 (1994). The gap between black families has widened since the late sixties. The current figure is only 54.8% of the median family income for whites. In 1969, black family income was 61.3% of white family income.

One of the major criticisms of the feminist movement is that white women have excluded and/or devalued the black woman. Black feminist theorist Bell Hooks describes the "being-left-out" phenomenon: "Like Friedan before them, white women who dominate feminist discourse today rarely question whether or not their perspective on women's reality is true to the lived experiences of women as a collective group." HOOKS, supra note 65, at 3. Hooks and others state that the primary goal of modern feminists is "to gain equality with men of their class." See SKIN DEEP, supra note 101, at 271.

Michele Wallace talks about how she was warned by other African-Americans that joining the feminist movement was not in her best interest. See WALLACE, supra note 137. "In Ebony, Jet and Encore, and even in The New York Times, various black writers cautioned black women to be wary of smiling white feminists. The movement enlist the support of black women only to lend credibility to an essentially middle-class, irrelevant movement, they asserted." Id. at 23; see also Pamela J. Smith, Comment, We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate, 66 TUL. L. REV. 1467, 1475-77 (1992).

Audre Lorde also provides a poignant example of the different realities of black and white women:

Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our
reputation has been questionable at best. White women have been deemed good women as long as they stay within the prescribed limits of their proper roles.\textsuperscript{146} Black women have never had the benefit of that

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\textsuperscript{146} Children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying.


The problem of racism in the feminist movement is not of recent vintage. In the first American woman's movement of the late 1800s and early 1900s, prominent suffragettes played the race card when they thought it would help their cause. Elizabeth Cady Stanton, who was opposed to the passage of the Fifteenth Amendment, chided the New York Legislature for giving the negro male the franchise, and not white women. She said, "[y]ou place the negro, so unjustly degraded by you, in a superior position to your own wives and mothers . . . ." Elizabeth Cady Stanton, \textit{Address to the Legislature of the State of New York, in 1 HISTORY OF WOMEN'S SUFFRAGE 1848-1861, at 595-605 (reprint ed., 1985).} Not all women in the early movement were opposed to the Fifteenth Amendment. Lucy Stone of the American Woman's Suffrage Association supported giving black men the right to vote.

Perhaps one of the most telling examples from the early movement of the coolness of white women in the feminist movement to accept their black sisters is the story told by Frances Gage concerning Sojourner Truth's appearance at the Akron Convention on Women's suffrage in 1851. \textit{id. at 115-17.} Gage was told by her comrades, "(D)on't let her speak, Mrs. Gage, it will ruin us. Every newspaper in the land will have our cause mixed up with abolition and niggers, and we shall be utterly denounced." \textit{id. at 115.} Sojourner Truth did eventually give her \textit{Ain't I a Woman} speech and masterfully rebutted arguments of male attendees who connected the sex of Christ with the rights of women. \textit{id. at 115-17.} Roberts explains how racism and sexism are not mutually exclusive battles.

"White feminists have sometimes seen the fight against racism as a separate issue. But the very images of what a woman is in our culture have depended upon how we think about race, and what representations govern our assumptions." ROBERTS, \textit{supra} note 143, at 9.

\textsuperscript{146} During the 19th century there was an emergence of thought known as the cult of domesticity, or true womanhood, that held that women were morally and spiritually superior and that their sphere of influence was to be in the home. DEBORAH RHODE, \textit{JUSTICE AND GENDER} 11 (1989). White women who conform to roles that society has traditionally set aside for them (e.g., wife and mother) have been granted madonna status. CLARICE FEINMAN, \textit{WOMEN IN THE CRIMINAL JUSTICE SYSTEM} 3 (1994). Women who do not conform are considered whores. The madonna/whore duality is an ancient concept. Feinman traces the labels back to classical times. \textit{id. at 4-5.} If a woman became a criminal it was because she failed to fulfill her proper feminine roles. \textit{id. at 10.} One example of this belief was expressed by Cesare Lombroso, a 19th century Italian physician who studied brain size, shape of the face, and muscle tone, among other physiological traits, to determine the connection between biology and criminal behavior, especially among prostitutes. \textit{id.} "Her normal sister is kept in the paths of virtue by many causes, such as maternity, piety, weakness, and when these counter influences fail, and a woman commits a crime, we may conclude that her wickedness must have been enormous before it could triumph over so many obstacles." \textit{id.} (quoting CESARE LOMBROSO \& WILLIAM FERRERO, \textit{THE FEMALE OFFENDER} 152 (1895)); \textit{see also} Denno, \textit{supra} note 63, at 86-95 (discussing views on female crime).
presumption. In fact, black women have to counter the opposite assumption, which is that their color makes them suspect, unless they prove otherwise. 147 Opinions about black women in America had their genesis in slavery. The *Emancipation Proclamation* and the Thirteenth Amendment 148 to the Constitution freed the black woman from involuntary servitude. Formal equality pronounced by the Constitution, civil rights laws and court opinions reflect an ideal. However, the rule of law cannot dictate attitudes. Everyone has opinions, but in the marketplace of ideas, certain group preferences are more persuasive than others. The combination of attitude plus power determines the impact of

First Lady Hillary Clinton received considerable criticism from conservatives who were leery of a president's wife who did not fit the subdued image of former first ladies. See Patricia J. Williams, *Bewitched: The Demonization of Hillary Clinton*, VILLAGE VOICE, Jan. 26, 1993, at 35. Williams refers to a Daniel Wattenberg article which characterizes Hillary Clinton's image as "consuming ambition, inflexibility of purpose, domination of a pliable husband and an unsettling lack of tender human feeling, along with the affluent feminist's contempt for traditional female roles." Id. Williams reveals the great sin of the first lady: "she left the nicely wallpapered domestic sphere with a slam of the door, crossed the forbidden threshold, took up public life on her own leaving big feminist footprints all over the place and without so much as an apology." Id. at 39. Mrs. Clinton is not the first president's wife to raise questions about the role of the First Lady. Eleanor Roosevelt was not without her critics, and Rosalyn Carter was criticized for attending and contributing to cabinet meetings.

147. See LERNER, supra note 107, at 163. In a section called The Myth of the “Bad” Black Woman, Lerner states:

A myth was created that all black women were eager for sexual exploits, voluntarily “loose” in their morals and therefore, deserved none of the consideration and respect granted to white women. Every black woman was, by definition, a slut according to this racist mythology; therefore, to assault her and exploit her . . . was not reprehensible and carried with it none of the normal communal sanctions against such behavior. A wide range of practices reinforced this myth: the laws against intermarriage; the denial of the title “Miss” or “Mrs.” to any black woman; the taboos against respectable social mixing of the races; the refusal to let black women customers try on clothing in stores before making a purchase; the assigning of a single toilet to both sexes of Blacks . . . .

Id. at 163-64.

A nonconforming woman has been described as one who “questions beliefs or practices, one who engages in activities traditionally associated with men, or one who commits a crime.” FEINMAN, supra note 146, at 3. In other words, it is a woman who engages in conduct that is not befitting her prescribed role. By contrast, an African-American woman is nonconforming not because of what she does or does not do, but because of who she is. Crenshaw, supra note 75, at 1280.

148. Mississippi is the latest state to vote on the ratification of the 13th Amendment. The Senate vote was taken February 16, 1995, 130 years after the amendment became law. See Senate Votes to Abolish Slavery, COM. APPEAL., Feb. 17, 1995, at 12A.
beliefs on the greater society. While progress toward an ideal color-blind society has been made, race-consciousness is still the reality. Justice Marshall’s dissent in *City of Richmond v. J. A. Cronson Co.*, supra expressed the continuing legacy of historical racial inequality. He said, “[t]he tragic and indelible fact [is] that discrimination against blacks . . . in this Nation has pervaded our Nation’s history and continues to scar our society.”


Segregation is the manifestation of the concept of black inferiority and white superiority. See Mahoney, *supra* note 143, at 1659. Housing discrimination is indicative of both domintive racism (the burning of crosses on the lawns of blacks by their new white neighbors) and aversive racism (steering black families away from white neighborhoods). The Supreme Court, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), declared that racial covenants that restricted the sale of homes to blacks were unenforceable in courts. However, housing remains the “single most segregated aspect of American life.”

David Gelman et al., *Black and White in America*, Newsweek, Mar. 7, 1988, at 18, 20. As of 1980, 31% of blacks lived in neighborhoods that were 90% or more black. *Id.* at 20; see also Isabel Wilkerson, *The Tallest Fence: Feelings On Race in a White Neighborhood*, N.Y. Times, June 21, 1992, at 18 (quoting Peggy O’Connor: “I don’t mind them, but I don’t want them living next to me . . . I don’t want to be too close to them.”).

Public officials have decided to allow their cities to go bankrupt and have been held in contempt of court rather than allow low-income housing to be built that would integrate their communities. See Spallone v. United States, 493 U.S. 265 (1990). A district court found that for three decades the city of Yonkers, New York, had perpetuated housing segregation. Rather than follow the directives of a consent decree, the city council voted a moratorium on all public housing. When Judge Sand imposed contempt fines, Yonkers residents told city officials that they would prefer bankruptcy to integration. City Council member Henry J. Spallone openly defied the judge and brought suit to find the contempt citations against the city and the council members in their personal capacity unconstitutional. Spallone’s actions resulted in $12 million in legal fees for the city and $450,000 in contempt fines. James Feron, *Housing Construction Starts Without Fanfare in Yonkers*, N.Y. Times, Apr. 13, 1991, at 25. Spallone used his court challenges as a springboard for election to mayor. The Supreme Court reversed the district court’s decision to hold individual council members in contempt for their failure to move forward with the provisions of the consent decree. By the fall of 1991, public housing had been built in Yonkers. Lisa W. Foderaro, *Yonkers Public Housing Is Now a Cooler Issue*, N.Y. Times, Sept. 11, 1991, at 18.
The law now requires that race hold no legal distinction. However, the social meaning of ethnicity did not evaporate when civil rights laws were passed. What race has meant and what it still means is deeply embedded in the national psyche. Beliefs about African-American women can be traced to the representations of black women by the dominant culture (i.e., stereotypes). As will be shown in sections that follow, stereotypes impact daily aspects of African-American women's lives. A black battered woman on trial does not have the option of relieving herself of burdensome, prejudicial notions about who she is when she steps into the courtroom. She must prove her innocence while combatting prevailing myths that would discredit her. The discussion below examines the phenomenon known as racial stereotyping, including the historical labeling of black women.


The Department of Housing and Urban Development took over a Vidor, Texas, public housing project after white residents drove away black residents. See Guy Gugliotta, Housing Still Separate, Unequal in East Texas: HUD Struggles to Reverse Segregation Legacy, WASH. POST, Mar. 7, 1994, at A1. HUD has been criticized by fair housing advocates and the courts for its hostility to civil rights enforcement. See Testimony September 28, 1994, Judith A. Browne Assistant Counsel NAACP Legal Defense Fund Judiciary/Civil and Constitutional Rights Fair Housing, Federal Document Clearing House Congressional Testimony; see also Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993). The federal government has historically promoted racial segregation in housing. See Mahoney, supra note 143, at 1669-75.

Even if the resistance to black neighbors is not a problem, getting the capital to secure a home can still be a barrier. The Federal Financial Institutions Examination Council reports that blacks are continually denied mortgages at a higher rate than whites. See Race and Business, supra note 144, at 29. In 1993, blacks were denied mortgages 34% of the time, as compared to the 15% rejection rate of whites. Id. Recently an Ohio mortgage company agreed to a $420,000 settlement with the Justice Department for charging higher fees to black applicants. See Keith Bradsher, Ohio Mortgage Bank Settles Discrimination Complaint, N.Y. TIMES, Oct. 19, 1995, at C5.

One of the indices of the gap between whites and blacks is wealth. The median wealth of black families is only one tenth that of white families. Harrison Rainie et al., Black & White in America, U.S. NEWS & WORLD REP., July 22, 1991, at 18, 19. For an analysis of the relationship between housing segregation and poverty, see DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1993) (stating that blacks in the ghettos of American cities are "among the most isolated people on earth").


III. STEREOTYPES: THE IMPACT OF HISTORICAL CULTURAL REPRESENTATIONS

The subtlest and most pervasive of all influences are those which create and maintain the repertory of stereotypes. We are told about the world before we see it. We imagine most things before we experience them. And those preconceptions, unless education has made us acutely aware, govern deeply the whole process of perception.¹⁵⁴

Next comes a warmer race, from sable sprung, To love each thought, to lust each nerve is strung; The Samboe dark, and Mulatto brown, The Mestize fair, the well-limb'd Quaderoon, And jetty Afric, from no spurious sire, Warm as her soil, and as her sun-on fire. These sooty dames, well vers'd in Venus' school, Make love an art, and boast they kiss by rule.¹⁵⁵

White girls are pretty funny, sometimes they drive me mad, black girls just want to get fucked all night I just don't have that much jam.¹⁵⁶

A stereotype is a fixed impression that "conforms very little to the facts . . . and results from our defining first and observing second."¹⁵⁷ Sociologists and psychologists have researched the phenomenon of stereotyping. In his classic work, The Nature of Prejudice, Gordon Allport defines a stereotype as "an exaggerated belief associated with a category. Its function is to justify (rationalize) our conduct in relation to that category."¹⁵⁸ Stereotypes are "the language of prejudice."¹⁵⁹

¹⁵⁴. WALTER LIPPMAN, PUBLIC OPINION 59 (1922).
¹⁵⁵. Jamaica, a Poem in Three Parts, quoted in JORDAN, supra note 120, at 150.
¹⁵⁶. THE ROLLING STONES, Some Girls, on SOME GIRLS (Warner Communications 1978).
¹⁵⁷. John C. Brigham, Ethnic Stereotypes, 76 PSYCHOL. BULL. 15, 17 (1971) (quoting Katz & Braly, Racial Prejudice and Racial Stereotypes, 30 J. ABNORMAL & SOC. PSYCHOL. 175, 181 (1935)). The term stereotype, as used in conjunction with human traits, is derived from the printing industry. See MARY R. JACKMAN, THE VELVET GLOVE: PATERNALISM AND CONFLICT IN GENDER, CLASS, AND RACE RELATIONS 302 (1994). Jackman explains that a stereotype for printers is "a one-piece printing page of set type . . . . Stereotypes thus preempt raw perception with a rigidly fixed stamp." Id.
¹⁵⁸. GORDON ALLPORT, THE NATURE OF PREJUDICE 191 (1979). Allport goes on to explain how stereotypes work as screening mechanisms. "The stereotype acts both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking." Id.
Attitudes about ethnic groups are a part of the social heritage of a society. They appear in a range of materials from academic sources to rock-and-roll lyrics. For example, although the above quotation cited by Jordan and the lyrics by The Rolling Stones were written more than 200 years apart, the statements promote the same stereotype about black women: they are sexually available.

The categorization of groups provides "the mold which gives shape to intergroup attitudes." Justice John Paul Stevens declared, "Habit, rather than analysis, makes it seem acceptable to distinguish between male and female, alien and citizen, . . . for too much of our history there was the same inertia in distinguishing between black and white." By the time a child is four or five, he or she has learned the significance of skin color and racial membership. Whites have been

at 192.

Bell Hooks defines stereotypes as "a fantasy, a projection onto the Other that makes them less threatening." Bell Hooks, Representations of Whiteness in the Black Imagination, in BLACK LOOKS, RACE AND REPRESENTATION 165, 170 (1992).


160. A recent Harris poll commissioned by the National Conference of Christians and Jews revealed that Americans are just as divided on the issue of race as they were 40 years ago. See Christopher Herlinger, Racial, Religious Stereotypes Linger: Survey Results Called Discouraging, CHI. TRIB., Mar. 11, 1994, at 7; LOU HARRIS, TAKING AMERICA'S PULSE, THE NATIONAL CONFERENCE, L. H. RESEARCH (study 930019) (1994). The study found that while whites believe minorities are treated equally, id. at 1, minorities complain of unequal treatment. Id. at 4. Further, negative stereotypes held of blacks included the belief that African-Americans were more likely to commit crime and violence, and that blacks had less family unity. Id. at 7; see also Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). Devine states that membership in a target group "activates, or primes, the stereotype in the perceiver's memory, making other traits or attributes associated with the stereotype highly accessible for future processing." Id. at 7.


163. See Brigham, supra note 157, at 21; see also Mary Ann Newman et al., Ethnic Awareness in Children: Not a Uniary Concept, 143 J. GENETIC PSYCHOL. 103 (1983). Newman's study showed that Anglo children were the most same-ethnic preferred out of groups of children, which included Hispanic and black children.

Writer Audre Lorde provides an example of how young children learn the relationship between skin color and roles. One day, while wheeling her two-year-old daughter around in the shopping cart, Lorde passed a white woman and her little girl in the aisle. The little white girl "called out excitedly, 'Oh, look Mommy, a baby maid.' " LORDE, supra note 119, at 126.

In the 1950s, sociologist Kenneth Clark wrote that a child's attitude toward African-Americans is determined "not by contact with Negroes but by contacts with prevailing attitudes toward Negroes." KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 25
taught either expressly or implicitly that they are better than blacks. Dr. Clark also noted the impact of white bigotry on black children. "It is clear that the Negro child, by the age of five, is aware of the fact that to be colored in contemporary American society is a mark of inferior status." See Kenneth Clark & M. Clark, Emotional Factors in Racial Identification and Reference in Negro Children, 19 J. Negro Educ. 341, 350 (1950); see also Eirich, The Stereotype Within: Why Students Don’t Buy Black History Month, WASH. POST, Feb. 13, 1994, at C1. Eirich, a sixth grade teacher, gave a contemporary example of how young black students have internalized racism. A black student told Eirich, “Everybody knows that black people are bad. That’s the way we are.”

Professor Kimberle Crenshaw has provided the following chart of historical oppositional dualities that illustrate how the negative image of blacks corresponds with the image of whites:

<table>
<thead>
<tr>
<th>WHITE IMAGES</th>
<th>BLACK IMAGES</th>
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<tbody>
<tr>
<td>Industrial</td>
<td>Lazy</td>
</tr>
<tr>
<td>Intelligent</td>
<td>Unintelligent</td>
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<tr>
<td>Moral</td>
<td>Immoral</td>
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<tr>
<td>Knowledgeable</td>
<td>Ignorant</td>
</tr>
<tr>
<td>Enabling Culture</td>
<td>Disabling Culture</td>
</tr>
<tr>
<td>Law-Abiding</td>
<td>Criminal</td>
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<tr>
<td>Responsible</td>
<td>Shiftless</td>
</tr>
<tr>
<td>Virtuous/Pious</td>
<td>Lascivious</td>
</tr>
</tbody>
</table>

Kimberle Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1373 (1988). Crenshaw also explains how racism and oppression work. "Racism serves to single out Blacks as one of these groups ‘worthy’ of suppression. . . . The most significant aspect of Black oppression seems to be what is believed about Black Americans not what Black Americans believe." Id. at 1358.

The overvaluation of white skin and the devaluation of black skin was illustrated by sociologist Kenneth Clark with his doll experiments of the 1950s, which were used to demonstrate the detriment of separate-but-equal, Jim Crow policies supported by the legal system from 1896 to 1954. However, whites still value their skin color and the resultant benefits that whiteness brings. See HACKER, supra note 72, at 31-32.

Sometimes the unconscious may take control when public demeanor would dictate otherwise. For example, while on the 1980 presidential campaign trail, Nancy Reagan called her husband, after attending a Chicago fundraiser, and said to him that “she wished he could be there to see all these beautiful white people.” See On Reagan Campaign: “There Goes Connecticut,” WASH. POST, Feb. 18, 1980, at A2. Upon realizing that she had been overheard, the soon-to-be First Lady amended her comment to “beautiful black and white people.” Id. Later she told a reporter that she was sorry and did not mean the comment. Id.
Pettigrew provides an example: "[m]any Southerners have confessed to me, for instance, that even though in their minds they no longer feel prejudice against blacks, they still feel squeamish when they shake hands with a black." 166

Stereotypes about African-Americans have been a frequent topic of research. 167 Scientists repeatedly find that blacks consistently receive the most unfavorable attributions. 168

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166. Daniel Goleman, *Useful Modes of Thought Contribute to the Power of Prejudice*, N.Y. TIMES, May 12, 1987, at C1. Former Lieutenant Governor Lowell Thomas, Jr., son of the news commentator, apologized to his state constituents after making the comment that racial intermarriage was against nature. See *Notes on People*, N.Y. TIMES, Dec. 3, 1977, at 21. Thomas was baffled that he had even made the remark and said, "[i]t must have represented a prejudice rooted in my childhood that frankly, I was not even aware of." 169

Hugh Butts has characterized racism as an ego defect. See Hugh F. Butts, *White Racism: Its Origins, Institutions and the Implications for Professional Practice in Mental Health*, 8 INT'L J. PSYCHIATRY 914 (1969). Butts also points out that "culturally acceptable behavior may be psychiatrically as well as socially pathological. It may be 'acceptable' only because it is so common." Id. at 925.


The late ABC sports commentator Howard Cosell, who considered himself to be a great supporter of black athletes, particularly the boxer Muhammad Ali, was criticized for calling football player Alvin Garrett a "little monkey." 170 Cosell's Remarks Raises Ire, WASH. POST, Sept. 6, 1983, at D6. Cosell did not remember the remark, but his comment had been taped. 171

Even members of the judiciary have compared blacks to monkeys. President Kennedy's first judicial appointment, Mississippi Appeals Judge William Howard Cox, called black plaintiffs suing for the right to vote, "A Bunch of Niggers . . . acting like a bunch of chimpanzees." See RICHARD REEVES, PRESIDENT KENNEDY: PROFILE OF POWER 466 (1993). Recently a California superior court judge was publicly censured by the California Supreme Court for his racist remarks. See *In re Stevens*, 645 P.2d 99 (Cal. 1982). Judge Stevens had referred to black persons, particularly black males, as "jig," "dark boy," "colored boy," "nigger," "coon," and "jungle bunny." Id. at 404. Neither the governing disciplinary council nor the courts felt that Stevens' statements, written or oral, were sufficient to require his recusal in a case dealing with black litigants. Stevens had stated to court officials "let's get on with this Amos and Andy Show." Id.
Among the historical stereotypes that were created to keep black women marginalized were Mammy, Aunt Jemima, and Justice Craig Wright of the Ohio Supreme Court came under criticism when he made racially disparaging comments. See James Bradshaw, Wright Admits Making Taped Racist Comment, COLUMBUS DISPATCH, Feb. 9, 1993, at 3B. Justice Wright was surreptitiously taped by former court administrative director Louis Damiani. Wright says the county court judges were complaining about Damiani and had called Damiani "everything but a nigger named Mo." Id. On a second tape recorded by Damiani, a man who is purportedly Wright asks Damiani whether he has black blood in his ancestry. Id. Wright's comments were brought before a disciplinary committee and dismissed. See James Bradshaw, Charges of Racism Have Been Dropped, Wright Announces, COLUMBUS DISPATCH, Oct. 26, 1993, at 2B. Damiani says investigators never took his statement. Id.

The Ohio State Bar Association issued a statement condemning the acts of Wright. The organization further said, "[i]t is of particular concern that such comments were made by a member of the Supreme Court." OSBA Officers Respond to Justice Wright Controversy, OHIO STATE BAR ASS'N REP., Mar. 1, 1993, at 141. "This type of language has no place in the justice system and reinforces the perception of disparate treatment of women and minorities appearing before our courts. Such remarks undermine public confidence in the fairness and impartiality of our state's highest courts." Id. The racist attitude of Detective Mark Fuhrman of the Los Angeles Police Department was exposed during the O.J. Simpson double murder trial. See Fuhrman Confirms Worst Fears, Editorial, ATLANTA CONST., Aug. 31, 1995, at 14A. Fuhrman was the key prosecution witness who testified to finding a bloody glove on the Simpson estate. Fuhrman told the court that he had not used the word "nigger" in the last 10 years. See DeWayne Wickham, Fuhrman Revelations Aid Conspiracy Theory, USA TODAY, Aug. 21, 1995, at 11A. Twelve tape interviews with screenwriter Laura Hart McKinney revealed that Fuhrman had used the derogatory term on tape at least 30 times. Id.

169. See COLLINS, supra note 141, at 67. Collins notes that "portraying African-American women as stereotypical mammies, matriarchs, welfare recipients, and hot mommas has been essential to the political economy of domination fostering Black women's oppression." Id.

170. A mammy is defined as a Negro woman engaged as a nurse to white children or as a servant to a white family. RANDOM HOUSE, COLLEGE DICTIONARY 811 (1988). The asexual mammy image was designed to obscure the exploitation of the black woman domestic. See Mac King, The Politics of Sexual Stereotypes, 4 BLACK SCHOLAR 16 (1973). This persona was introduced in American literature in the eighteenth century by author Washington Irving and other writers, including James Fenimore Cooper, William Gilmore Simms, Henry Timrod, William Faulkner, Allen Tate, and Robert Penn Warren. See Sondra O'Neale, Inhibiting Midwives, Usurping Creators: The Struggling Emergence of Black Women in American Fiction, in FEMINIST STUDIES, CRITICAL STUDIES 139, 146 (Teresa De Lauretis ed., 1986).

171. See Brent Staples, Aunt Jemima Gets a Makeover, N.Y. TIMES, Oct. 19, 1994, at A22. Staples mentions one of the best known mammies, Hattie McDaniels, who won the Academy Award for playing "Mammy" in the ever-popular Gone With the Wind. Aunt Jemima, portrayed by a mammy whose real name was Lois Gardella, was created for the Chicago Columbian Exposition in 1893. Aunt Jemima has appeared on pancake boxes for years. Just recently, Quaker Oats has decided to replace the older Aunt Jemima with Grammy Award winner Gladys Knight. Id.; see also DONALD BOGEL, TOMS,
Modern caricatures include Sapphire, the matriarch. Jezebel. Modern caricatures include Sapphire, the matriarch. Coons, Mulattoes, Mammy and Bucks (1973); K. Sue Jewell, From Mammy to Miss America and Beyond (1993). Bogel discusses the history of blacks in American films and how that art form has perpetuated myths and negative images of black Americans.

172. Jezebel is a wanton, sensuous, "wicked, shameless woman." See Random House, supra note 170, at 719. The original Jezebel was the wife of King Ahab of Israel. See 1 Kings 16:31. Jezebel was known for her evilness and her animosity toward the prophet Elijah. At one point, Elijah became so afraid of her that he fled to the wilderness to escape her wrath. See 1 Kings 19. The Jezebel characterization (i.e., woman as whore) was given to African women before they reached the new colonies. See Jordan, supra note 120, at 35. Jordan says:

By the eighteenth century a report on the sexual aggressiveness of Negro women was virtually de rigueur for the African commentator. By then, of course, with many Englishmen actively participating in the slave trade, there were pressures making for descriptions of 'hot constitution'd Ladies' possessed of a 'temper hot and lascivious, ... '. And surely it was the Negro women who were responsible for lapses from propriety: 'If they can come to the Place the Man sleeps in, they lay themselves softly down by him, soon wake him and use all their little Arts to move the darling Passion.

Id. (quoting William Smith, New Voyage To Guinea 221 (1744)). The character Aunt Jezebel appears in Willa Cather's novel Sapphira and the Slave Girl (1941).

173. Sapphire was a character created on the Amos and Andy radio and television shows. Amos and Andy began as a radio comedy about two black males. The original Amos and Andy were white males mimicking blacks. See B. Andrews & A. Julliard, Holy Mackerel!: The Amos 'N' Andy Story (1986). When the show was brought to CBS-TV in 1951, black actors were hired. Sapphire was the wife of a character named Kingfish, and has come to symbolize a black woman who is "the counterpart to Aunt Jemima." See Hooks, supra note 125, at 85. Hooks says, "[a]s Sapphires, black women were depicted as evil, treacherous, bitchy, stubborn and hateful, in short all that the mammy figure was not." Id.; see also Jean Carey Bond & Patricia Perry, Is the Black Male Castrated?, in The Black Woman: An Anthology 113 (Toni Cade ed., 1970). Bond and Perry state: "Movies and radio shows of the 1930's and 1940's invariably pedaled the Sapphire image of the black woman: she is depicted as iron-willed, effectual, treacherous toward and contemptuous of black men, the latter being portrayed as simpering, ineffectual whipping boys." Id. at 116; see also Regina Austin, Sapphire Bound! 1989 Wis. L. Rev. 539; Patricia Bell Scott, Debunking Sapphire: Toward a Non-Racist and Non-Sexist Social Science, in All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave 85 (Gloria T. Hull et al. eds., 1982).

Woody Allen has resurrected what could be considered a cross between the mammy character and Sapphire in his 1994 film, Bullets Over Broadway. Venus, an obese, African-American woman (played by Annie-Joe Edwards), is acerbic and witty when dealing with her employers. See Janet Maslin, Film Festival Review, Allen's Ode to Theater and As Always New York, N.Y. Times, Sept. 30, 1994, at Cl.

The character Sapphire returned to primetime television (although she has not yet made an appearance). The CBS network opened its 1995 winter season with a sitcom produced, written, and directed by the successful Linda Bloodworth-Harry Thomason team. Women of the House stars Delta Burke as Suzanne Sugarbaker, the ex-beauty queen of the popular TV sitcom Designing Women, who has become a congresswoman. Suzanne
and the welfare queen. These representations are so powerful

has a black maid back in Georgia named Sapphire. See Sid Smith, Mining Politics; Suzanne Sugarbaker Goes to Washington in a New Sitcom from the Thomasons, CHI. TRIB., Jan. 4, 1995, at 3.

174. The black woman as matriarch symbolizes the black mother in her home. The matriarch is the mammy gone bad, a failed mammy, because she has spent too much time away from home, has not properly supervised her children, is overly aggressive, and emasculates the men in her life. See Collins, supra note 141, at 74. The matriarch was the centerpiece of the Moynihan Report of the mid-1960s. See Office of Policy Planning and Research, U.S. DEP'T OF LABOR, THE CASE FOR NATIONAL ACTION—THE NEGRO FAMILY 29-34 (1965). Daniel Patrick Moynihan blamed the educational, economic, and social decline of the black family on the black women's preference for a matriarchal system, and later advised the Nixon administration that civil rights issues should be treated with "benign neglect." Moynihan stated:

At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family. It is the fundamental source of the weakness of the Negro community. . . . In essence, the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole.

Id. at 30. The black, female, single, head-of-household position was seen as the cause of the lack of black economic progress, rather than oppression and poverty. For a variety of responses to the Moynihan report from civil rights leaders (including Martin Luther King, Jr., James Farmer, and Bayard Rustin), intellectuals, and others who challenge its validity, see Lee Rainwater & William L. Yancey, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967). Black female scholars have also repudiated the matriarchy thesis. See Joyce Ladner, TOMORROW'S TOMORROW (1972); Rose Brewster, Black Women in Poverty: Some Comments on Female-Headed Families, 13 SIGNS 331-39 (1988); Harriette Pipes McAdoo, Strategies Used by Black Single Mothers Against Stress, in SLIPPING THROUGH THE CRACKS 153-66 (1986); Carrie Allen McCray, The Black Woman and Family Roles, in THE BLACK WOMAN 67-78 (La Frances Rodgers-Rose ed., 1980).

Angela Davis, among others, has disagreed with the use of the adjective of matriarchal to describe black households headed by females because females do not predominate economic or political influence. See Leroy Woodson, Jr., So Says: Angela Davis, N.Y. TIMES MAG., Mar. 2, 1986, at 28.

175. While the problem with the matriarch is that she is too aggressive, the welfare mother is not aggressive enough. She shuns work and passes bad values onto her children. See Collins, supra note 141, at 77. Unlike the breeder slave woman who was most valuable when she bore children, the welfare mother must be discouraged from producing because her offspring are a threat to economic stability. See Mary Edsall & Thomas Edsall, When the Official Subject Is Presidential Politics, Taxes, Welfare, Crime, Rights, or Values . . . the Real Subject Is Race, THE ATLANTIC, May 1991, at 53. The authors recall one of President Reagan's favorite anecdotes, "the inflated story of a Chicago 'welfare queen' with 'eighty names, thirty addresses, twelve social security cards,' . . . whose 'tax-free income alone is over $150,000.'" Id. at 76; see also Steven V. Roberts, Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back, N.Y. TIMES, Apr. 4, 1981, at 11; Wilkerson, supra note 150, at 18. Wilkerson recounts an interview with Peggy O'Connor, a white Chicago suburbanite who worked as a
that the sight of a woman of African descent can trigger responses of violence, disdain, fear, or invisibility. Black women are waitresses and were the wives of police officers. O'Connor said what made her angry was that "blacks buy porterhouse steaks with food stamps, while we eat hamburgers." O'Connor admitted that she had never seen any blacks buy the steaks but she had gotten the information from stories she had either read or heard.

During the transition period of the first Reagan administration, Clarence Thomas, then a staffer in Senator Danforth's office, made a speech at a meeting of black conservatives encouraging them to support the Reagan presidency. See TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES 85 (1992). A reporter interviewed Thomas, who used his sister, Emma Mae Martin, as an example of what he considered wrong with the welfare system. Thomas said, "She gets mad when the mailman is late with her welfare check, that is how dependent she is." Id. However, the authors state that Martin, who had stayed in Pin Point, Georgia, caring for her aunt and children while working at lowly jobs, was supporting herself without government aid by the time of Thomas' nomination. Id. For a discussion of the contrast in the upbringing of the Thomas siblings, see JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE, THE SELLOUT OF CLARENCE THOMAS 31-61 (1994). Mayer and Abramson state that Thomas was very disparaging of both his mother and sister, calling them "trifling and lazy." Id. at 40; see also Charlotte Hettena, Thomas and Female Values, NEWSWEEK, July 16, 1991, at 87 (interpreting the "disparity between [Emma Mae and Clarence's] social position," as indicative of the value placed on educating men as opposed to women).

Adrienne Cureton, a Philadelphia police officer, was attacked and beaten by her fellow officers when they refused to believe that she was a member of the force. See Black Plainclothes Officer Says the Police Beat Her, N.Y. TIMES, Jan. 13, 1995, at A14. Cureton and a uniformed officer were at the scene of a crime. Cureton was standing with her back to a door when other officers arrived at the scene, grabbed her, pulled her outside, and beat her with their fists and flashlights, despite the fact that Cureton was screaming, "Let me go! I'm a police officer assisting in an arrest." Id. A black officer had to intervene to stop the attack.

Hacker points to the extreme underrepresentation of black women as dental hygienists and suggests that white fear may be an explanation for the disparity. "Perhaps most revealing of all is the small number of black dental hygienists. While white patients seem willing to be cared for by black nurses, they apparently draw the line at having black fingers in their mouths." HACKER, supra note 72, at 110. Black dental hygienists make up only 2.5% of an occupation that is predominated by white females. See id. at 111. The late Elizabeth (Bessie) Delany recounts that on graduation day in 1928 from Columbia Dental School she became the class marshal and marched alone because her classmates would not march with her. See SARAH DELANY & A. ELIZABETH DELANY, HAVING OUR SAY 115 (1993); see also Vincene Verdun, The Ugly Truth Was the Outburst Was Anything but Racism, 3 BUS. L. TODAY, May-June 1994, at 18. Professor Verdun tells how she had to cope with the disrespect of a law student in her class, while the dean was present. Verdun discusses how, in a later conversation with the dean, she felt robbed of her blackness because he could not see the exchange with the student as an
ever cognizant of the possibility of public humiliation just because of who they are. For example, two black women, interviewed by sociologist Joe Feagin, recounted their experiences in the marketplace. The first woman

act of racism.

179. Title II of the 1964 Civil Rights Act was passed to ensure that “all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.” While the publicly displayed racial exclusions to public services have disappeared, poor service and/or different treatment by merchants has not disappeared. See Regina Austin, A Nation of Thieves: Securing Black People’s Right to Shop and Sell in America, 1994 UTAH L. REV. 147. Austin talks about how blacks are treated as if they are potential shoplifters, id. at 148, and how black women are consumers in order to “convey the message that they are respectable, attractive, professionally adept, and upwardly mobile.” Id. at 157.

Despite Title II prohibitions on different treatment, getting inside some business establishments can prove to be difficult. Professor Patricia Williams has related how she was insulted and humiliated by a white youth who refused to allow her into an upscale store when she rang the buzzer. Williams could see whites shopping but the teen blew bubble gum in her face from behind the glass doors and insisted that the store was closed. It was one o’clock in the afternoon. See Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism, 42 U. MIAMI L. REV. 127 (1987).

Professor Jennifer M. Russell exposed her pain about the way she and her husband, both middle-class professionals, had been treated by those who knew nothing of their backgrounds, but who had come to conclusions based on their ethnicity about how they should be treated. See Jennifer M. Russell, Nothing to Be Ashamed of, ESSENCE, Aug. 1991, at 140. Russell writes:

Cabbies refusing to stop for me and my physician husband, however, have never bothered to inquire about our educational backgrounds or socioeconomic status. Nor have salespersons who assume that our only business in their establishment is to shoplift their merchandise or engage in other criminal acts. And it certainly never occurred to the cashier flinging our change on the counter that we are members of the so-called elite corps—the Black middle class. Indeed we never thought to inform our offenders of that fact because whether they are aware of our individual circumstances or not neither explains nor justifies their utter disregard for our humanity.

Id.

Holiday Universal, Inc., a national health spa chain, admitted to overcharging and discouraging blacks from joining their clubs. See Aleinikoff, supra note 152, at 334. Club employees were told to “avoid selling memberships to blacks” by offering them the most expensive memberships or denying the existence of advertised promotional rates. Id. The employees were told to give blacks short tours and sales presentations and to indicate race on the application form. Id.; see also Kernan v. Holiday Universal, Inc., Civil No. JH-90-971, 1990 U.S. Dist. LEXIS 18097 (D. Md. Aug. 9, 1990). The defendants had moved to dismiss, claiming that 42 U.S.C. § 1981 did not provide a cause of action because the plaintiffs were suing for precontract formation conduct.

The above examples are provided to serve as reminders that blacks live in a society where they are never free from negative stereotypes and the resultant discriminatory treatment based on those stereotypes and prejudices.
said: "[I have faced] harassment in stores, being followed around, being questioned about what are you going to purchase here . . . . There are a few of those white people that won't put change in your hand, touch your skin—that doesn't need to go on." A second interviewee had this to say:

Because I'm a large black woman and I don't wear whatever class status I have, or whatever professional status [I have] in my appearance when I'm in the grocery store, I'm part of the mass of large black women shopping . . . . That means that they are free to treat me the way they treat most poor black people because they can't tell by looking at me that I differ from that.181

The "looking glass" experience of black women is one of being trapped between sub- and super-human imagery and expectations. In addition to the negative stereotypes African-American women encounter, attributes that in their truest sense should be considered positive, when applied to black women, can be detrimental. For example, as previously discussed, African-American women have been characterized as strong and independent. They are blamed for the breakup of their families. Often the strength of black women to survive and progress despite the almost insurmountable obstacles and odds is labeled as pathological at one extreme and disloyal at the other. Sociologist Calvin Herton attributes the black woman's drive (a character flaw) to the historical treatment of African-American women.182 If these stereotypes can affect public

181. Id. at 109.
182. See CALVIN C. HERTON, SEX AND RACISM IN AMERICA 136 (1966). Herton writes:

The cumulative effects of the way black women have been mistreated and sexually dehumanized in America, the way they have had to labor to earn a living and rear children and support both white and black men, from the days of slavery even until now have produced in many Negro females a sort of studism which expresses itself in a strong matriarchal drive.

Id.

Shahrazad Ali, a black woman who came from relative obscurity, was interviewed on numerous national television talk shows because of her controversial book and statements about the role of the black woman. See SHAHRZAD ALI, THE BLACKMAN'S GUIDE TO UNDERSTANDING THE BLACK WOMAN (1989). Ali's thesis is that black men will never excel until he "gets his woman under control." Id. at x. She also says:

[The black woman's] confusion about her role and purpose, and the interference of Western Society have produced inappropriate behavior. Her main fault is that she wants to have her own way. It is not an unfair
policy, routine transactions, and normal discourse, to what extent is generalization to charge the Blackwoman with being out of control due to her rebellion against the authority of the Blackman.

Id. at viii. Ali goes on to say that the motive of her book is "to put the original man back on top." Id. at x. But before this can happen the "Blackman must civilize the Blackwoman." Id. Finally, Ali recommends that when a Black woman gets out of line, violence may cure the problem. She suggests hitting the woman in the mouth, "because it is from that hole, in the lower part of her face that all her rebellion culminates into words." Id. at 169.

183. See Edsall & Edsall, supra note 175. The authors state:

In terms of policy, race has played a critical role in the creating of a disparity between rich and poor over the past fifteen years. Race-coded images and language changed the course of the 1980, 1984, and 1988 presidential elections . . . . the political role of race is subtle and complex.

Id. at 53. For an example, see Mickey Kaus, They Blowed It, NEW REPUBLIC, Dec. 5, 1994. The cover story states that “[t]he fundamental strategic mistake of the Clinton Presidency is now clear. If President Clinton had pushed for welfare reform rather than health care reform in 1994, we would be talking about a great Democratic realignment, rather than a great Republican realignment.” Id. The article goes on to say that despite the fact that welfare payments, including foodstamps, only represent three percent of the budget, the symbolic and substantive issue was about values. “Welfare sustains the underclass, which in turn drives the crime problem and the race problem.” Id. at 18.

The demonization of the welfare recipient who receives AFDC and foodstamps (as contrasted with other beneficiaries of entitlements, like midwestern farmers who get food stamps, or the elderly who get social security or Medicare) has been based on the perception that lazy, cheating, overbreeding, single black women are responsible for the ills of society, particularly crime. See Dorothy E. Roberts, The Value of Black Mothers’ Work, 26 CONN. L. REV. 871 (1994). Census data refute the myth that a majority of young black girls are having babies. Ninety percent of black girls aged 15 to 17 have no children, and 76% of black girls aged 18 to 19 are childless. See Steven A. Holmes, Income Gap Persists for Blacks and Whites, N.Y. TIMES, Feb. 23, 1995, at A21. The logic of those in favor of withdrawing the so-called safety net, and forcing poor mothers with children to find work, is that the nation will be wealthier, happier, and less burdened with crime. The connection between unwed and presumably welfare mothers and the destruction of the nation was provided by former Vice President Dan Quayle. Quayle attributed the Los Angeles rebellion after the acquittal in the first trial of the police officers who brutally beat motorist Rodney King to the breakdown in the family structure. See Roberto Suro, For Women Varied Reasons for Single Motherhood, N.Y. TIMES, May 25, 1992, at A12. The inference is that those who either protested what they felt was an unfair verdict, or even those who burned and looted, were from homes where women were on welfare; had men been in the homes, the reaction to the verdict would have been different. Quayle also compared the plight of unmarried black mothers to the TV fictional character Murphy Brown, who decided to have a child out of wedlock. Id. Margaret Welch, a white female welfare recipient in Chicago, explained her perception of what welfare was about to Studs Terkel:

The image people have of public aid is black women with a lot of kids. Before I went on public aid, I had that impression . . . . But when I was forced on public aid, my opinion changed. I was on an even keel with them . . . . They weren’t getting special treatment. They were having hard times
the African-American female defendant at a disadvantage when she is brought to trial for a violent crime—even if she claims that she acted in self-defense because she was being battered? Before this ultimate issue is addressed, the discussion which follows briefly analyzes the relationship of jury predisposition on race as an extra-legal factor that can influence a verdict.

IV. STEREOTYPES AS EXTRA-LEGAL FACTORS AT TRIAL

Extra-legal factors affect the outcome of a trial, but are not directly related to the evidence before the jury. For example, social and demographic characteristics, jury composition, and group dynamics may influence a verdict.184 When African-Americans are brought to trial, there is the lingering question of how extra-legal factors alter their ability to get a fair trial.185 The historical reality and present day perception that there are different standards of justice for people who are not of European descent is currently being debated in the media,186 government,187 the legal

too.


185. Decisions of guilt or innocence can be influenced by factors other than the evidence before the jury. See Ronald L. Michelini & Stephan R. Snodgrass, Defendant Characteristics and Juridic Decisions, 14 J. RES. PERSONALITY 340 (1980). Attractiveness is one of the characteristics that can appeal to a jury. For example, in the William Kennedy Smith rape trial, one female juror said that she did not believe that Smith could commit such a crime because he was too cute. See Rape: Not "A Night Out," ORLANDO SENTINEL TRIB., Jan. 14, 1992, at A8.

186. The Constitution states: “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . . .” U.S. CONST. amend. VI. For a discussion on this issue in connection with the O.J. Simpson trial, see Bill Minutaglio, Simpson Case Shows Races’ Differing Views on Justice: Experience Has Taught Blacks to Mistrust System, Experts Say, DALLAS MORNING NEWS, Aug 6, 1994, at A1; see also JUDGE’S BOOK, supra note 74, at 93 (stating that African-Americans approach the justice system “with trepidation and a good deal of ambivalence”). In the People v. Powell (Rodney King) case, one of two jurors of color, Virginia Loya, told reporters that the bias of the white jurors was evident. The white jurors “wanted to see what they wanted to see . . . . They already had their minds made up.” Robert Reinhold, After Police Beating Verdict, Another Trial for the Jurors, N.Y. TIMES, May 9, 1992, at A1, A11.

187. In a 1988 CBS-New York Times poll, the respondents were asked whether judges and courts treat whites and blacks the same. See Edsall & Edsall, supra note 175, at 78. Fifty-six percent of the white New Yorkers said that the system was fair, and 27%
Justice Blackmun's dissent in *Callins v.* system, and the courts. Justice Blackmun's dissent in *Callins v.* said that the system favored one race over another. Only 30% of the blacks polled felt that the system was fair and 49% felt that the courts were biased. In another survey, 34% of whites and 66% of blacks polled said that the United States justice system treats blacks charged with crimes more severely than whites so charged. *Black and White: A Newsweek Poll, Newsweek,* Mar. 7, 1988, at 23.

Civil litigation has not escaped this perception of bias. A National Law Journal/Lexis poll found that 70% of black respondents believed that jurors are more inclined to give money for a white person's injury than for a black person's. *See Racial Divide Affects Black, White Panelists, Nat'l L.J.*, Feb. 22, 1993, at S-8. A study of civil awards over a 20 year period in Cook County, Illinois, confirms black's views. In over 9000 civil trials from 1959-1979, black plaintiffs won less often than whites, and both black and white plaintiffs won more when the defendant was black. *See Audrey Chinn & Mark Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 37 (1985).*

188. In McCleskey v. Kemp, 481 U.S. 279, 319 (1987), Justice Powell suggested that legislatures should address the problem of the disproportionate numbers of blacks sentenced to death row. Representative John Conyers of Michigan introduced H.R. 4618, the Racial Justice Act of 1990, establishing penalties for the federal death penalty. The bill stated that "[t]he Constitution's guarantee of equal justice for all is jeopardized when the death penalty is imposed in a pattern in which the likelihood of a death sentence is affected by the race of the perpetrator or the victim." *Hearings Before Subcommittee on the Judiciary House of Representative, 101st Cong., 2d Sess. 3 (1990).*

The bill's purpose was to shift the burden to the government to prove that race was not a factor in the imposition of the death penalty. The American Bar Association was among numerous organizations that supported the legislation. *Id.* at 13-14. This proposal passed in the House of Representatives as part of the Omnibus Crime Bill. However, in conference committee, the act was removed.

189. Shortly after the Los Angeles riots in connection with the acquittal of the four officers charged with brutally beating motorist Rodney King, the American Bar Association formed a Task Force on Minorities and the Justice System. *See Talbot D'Alemberte, After the Verdict, Racial Injustice and American Justice, A.B.A. J., Aug. 1992, at 58.* D'Alemberte, then president of the ABA, stated that the disparities in the legal system "mock our stated ideals of justice for all." *Id.*

190. The Ohio Supreme Court is one of several state courts that has set up a study commission on the status of minorities in the legal system. *See Panel Appointed to Study Minorities in Legal System, Columbus Dispatch, June 23, 1993, at 4C.* Chief Justice Moyer appointed this committee after the controversy that arose after racial statements made by Justice Craig Wright were made public. *See supra* note 168.

A 1991 New York judicial commission concluded that the New York state court system was "infested with racism." *See Jerry Gray, Panel Says Courts Are "Infested with Racism,"* N.Y. Times, June 5, 1991, at B1. Cyrus Vance, the former U.S. Secretary of State and a member of this commission, stated that the court system does not treat everyone equally. *Id.* Chief Justice Sol Wachtler, who appointed the commission, noted that "there are two justice systems at work in the courts of New York State, one of whites and a very different one for minorities and the poor." *Id.* Justice Wachtler also said, "Perception becomes reality when it comes to bias or prejudice." *Id.; see also* Peggy C. Davis, *Law as Microagression,* 88 Yale L.J. 1559 (1989) (providing illustrations of the power of unconscious racism and why African-Americans doubt the fairness of the legal
Collins raised this issue in connection with capital cases and the death penalty. Racial bias in the courtroom is de jure illegal, but de facto bias has been in operation.

Juries are selected through the process of voir dire, meaning literally, to speak the truth. The public is now aware of the science of selecting the jury as a result of several high profile trials, including those of William Kennedy Smith, Rodney King, and O.J. Simpson. The voir dire rationale stems from the Sixth Amendment right to a fair trial. In the treason trial for Aaron Burr, Chief Justice Marshall explained that an impartial jury, as required by common law and secured by the Constitution, should hear the testimony and base its decision on the testimony and the law. Any juror with strong prejudices must be excluded.

Normatively, the objective of the voir dire process is impartiality. Voir dire should reveal and remove those persons from the jury whose biases, as a matter of law (e.g., juror having some previous history with defendant), might prevent them from fairly deliberating about the guilt or innocence of the defendant. In such a situation the juror is to be

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192. Id.
193. See The NAACP Legal Defense and Educ. Fund, The Color of Justice, A.B.A. J., Aug. 1992, at 62 (discussing the first trial (People v. Powell) of the four police officers who beat motorist Rodney King on a Los Angeles street). The article states: "While outrageous, the verdict and the racism that infected it were hardly aberrations. Indeed, the perception among many African-Americans that there are two systems of justice—one for whites and one for people of color—is not a result of one jury's decision in Simi Valley." Id.
197. Id. at 50.
198. Id. at 50-51.
199. In Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946), the Court said, "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."
struck for cause. However, actual bias, based on subjective factors (e.g., race or religion), may be harder to discern and counter. Peremptory challenges can be used to remove potential jurors for reasons other than race or sex. Although peremptory removals are not "[c]onstitutionally protected fundamental rights," the Supreme Court considers the process, "one of the most important of the rights secured to the accused." Justice Marshall expressed concern that the court take

200. See Swain v. Alabama, 380 U.S. 202, 220 (1965); see also ABA JUD. ADMIN. DIVISION COMM. ON JURY STANDARDS, STANDARDS RELATING TO JUROR USE AND MANAGEMENT xv (1993). Standard 8 states: "If the judge determines during the voir dire process that any individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual should be removed from the panel. Such determination may be made on motion of counsel or on the judge's own initiative." Id. at 73. The ABA Commentary to the rule lists prejudice against members of ethnic, racial, or religious groups among the reasons to strike a juror for cause. Id.

201. In 1875, Congress outlawed race-based exclusions of otherwise qualified potential jurors. Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243 (1988)). Five years later, the Supreme Court ruled in Strauder v. West Virginia, 100 U.S. 303, 310 (1880), that a state statute excluding black men from jury duty violated the defendant's 14th Amendment right of equal protection. In Batson v. Kentucky, 476 U.S. 79 (1986), a case involving racial peremptory challenges, the Court stated that "[r]acial discrimination in selection of jurors harms not only the accused . . . . Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id. at 87; see Sheri L. Johnson, The Language and Culture (Not to Say Race) of Peremptory Challenges, 35 WM. & MARY L. REV. 21 (1993). In Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992), the Court held that the Equal Protection Clause prohibits a criminal defendant from using peremptory challenges to remove a potential juror because of race.

Journalists have questioned the reliability of black jurors in the sensational double murder trial of O.J. Simpson. Simpson was accused of murdering his ex-wife, Nicole Brown Simpson, and Ronald Goldman, with Simpson later being acquitted on both charges. One columnist said, "[I]t is becoming a given that black jurors cannot be trusted to believe the worst about O.J. Simpson." Murray Kempton, Blind Faith in a Jury Has Its Rewards: It's Impossible to Know the Minds of 12 Ordinary People, It's Elitist to Presume the Worst, L.A. TIMES, July 22, 1994, at B7. Kempton concludes, however, that he must "trust black jurors" because, among other things, it is his civic duty. Id. After the Simpson verdict, many questioned whether the jury acquitted the defendant because he was black, despite the fact that two of the jurors were not black.

One California court has determined that battered women can be excluded from a jury. See People v. Macioce, 242 Cal. Rptr. 771 (Ct. App. 1987). In a case where a woman was convicted of the murder of her husband, the court determined that battered women were not an identifiable group whose presence is essential for a jury trial.

202. McCollum, 112 S. Ct. at 2358. The Court characterized the procedure as "one state-created means to the constitutional end of an impartial jury and a fair trial." Id.; see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (finding that the state's interest under the Equal Protection Clause is securing impartial triers of fact).

203. Swain, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).
a hard look at racially motivated challenges that might be disguised as facially neutral. Marshall explained that pretext anchored in racial stereotyping could be very subtle:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

The descriptive reality of the jury selection process does not necessarily conform to the normative theory. Prosecutors and/or defense attorneys want jurors with certain predispositions in order to get a conviction or acquittal. Justice may be blind, but jurors are not.

205. Id. (Marshall, J., concurring).
206. Clarence Darrow exploited the cultural, religious, and socio-economic biases of certain groups when impaneling a jury. He said:

In criminal cases, I prefer Catholics, Episcopalians, and Presbyterians to Baptists and Methodists, because the tenets held and disciplines practiced by the latter set higher standards of human conduct and make them less tolerant of human frailty. The Irishman and the Jew, because of their national background, will put a greater burden on the prosecution and prove more sympathetic and lenient to a defendant, than an Englishman or a Scandinavian whose passion for the enforcement of the law and order is stronger.

Freda Adler, Socioeconomic Factors Influencing Jury Verdicts, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973) (citing FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRALS 198 (1958)).

Thomas Salisbury provides a critique of the goals in jury selection from the prosecutorial and defense perspective. Thomas E. Salisbury, Forensic Sociology and Psychology: New Tools for the Criminal Defense Attorney, 12 TULSA L.J. 274, 276-77 (1976). Salisbury also summarizes research analyzing how the defense can better select jurors. One of the recommendations includes this advice regarding black defendants: "[i]f the defendant is black, defense counsel should attempt to impanel a jury which is generally young, above-average occupational status, above-average income, well educated, politically liberal, not identified with organized religion or regular church attendance, and single." Id. at 289. If the defendant is poor, the following advice is given: "Defense counsel should follow the same principles as when the defendant is black, except that persons of high income and education should be excluded from the jury." Id. at 289-90. This advice is nearly twenty years old, but may still be informing the selection process made by lawyers.

Defense attorneys are not alone in trying to choose certain types of jurors. A training manual for Dallas county prosecutors used in the 1970s gave explicit instructions on the type of juror that should be selected during voir dire. See Deborah Denno, Psychological Factors for the Black Defendant in a Jury Trial, 11 J. BLACK STUD. 313 (1981). The prosecutors were told, "[y]ou are not looking for a fair juror, but rather a
Jurors do not come to the courtroom with a blank slate. The most fair-minded person has opinions about how the world operates. A juror's experiential base is a function of many factors, including sex, race, age, personality, class, and religion.\textsuperscript{207} Justice O'Connor acknowledged this reality in \textit{J.E.B. v. Alabama ex rel T.B.}\textsuperscript{208} when she stated, "[w]e know that people do not ignore as jurors what they know as men or women."\textsuperscript{209} What we do not know empirically is the extent to which extra-legal factors influence verdicts.\textsuperscript{210} However, our judicial system
requires that jurors render verdicts that are based on the facts of the trial and not on pre-existing attitudes about issues or persons.

A person's physical appearance is the most obvious characteristic that is accessible to others in social interaction. Opinions of others are often based on responses to physical attributes. Assumptions that the physically attractive are more sincere, noble, and honest than the unattractive means that the attractive person will be treated with more respect than an unattractive person. While it would seem irrational to judge a person based on how he or she looks, cases have been litigated because ideas about biological and cosmetic preferences pervade decision making.

Beauty is said to be "in the eye of the beholder," so aesthetic choices are deemed individualistic. However, in a cultural context, these choices are informed and molded by the opinions of others, including the family, peers, the cultural group to which the person belongs, etc.
and the media.\(^{218}\) Thus, our concept of what is beautiful, and therefore

217. See Wilkerson, supra note 150, at 18. In comparing two mostly segregated Chicago neighborhoods, the reporter concluded that what whites learn about blacks "comes from television news or stereotypes passed down through the generations." Id.

218. Before television became the most popular form of entertainment and information, print media told us what and how to think about the world. A 1946 study of 198 short stories in eight of the country's most widely-read magazines concluded that prejudice was widespread. See Bernard Bereleson & Patricia J. Salter, Majority and Minority Americans: An Analysis of Magazine Fiction, 10 PUB. OPINION Q. 168 (1946). Among the other results of the research were the following: "Negroes and Jews never appeared as heroes or heroines. No Negroes or Jews were depicted as members of the armed forces," id. at 186; "Thus the condition and behavior of fictional characters can be readily used to 'prove' that Negroes are lazy and ignorant . . . ." Id. at 188; "The readers of short stories in popular magazines are constantly exposed, implicitly, to the prejudices and stereotypes attached to minority problems in the United States." Id. at 190. One of the few black characters in the researched short stories that the authors make reference to was "an amusingly ignorant Negro" named Rosemary who was a mammy-type figure. Id. at 180; see also Adenzo Addis, "Hell Man, They Did Invent Us": The Mass Media, Law, and African Americans, 41 BUFF. L. REV. 523, 533 (1993). Addis cites the following: "By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country." Id. (quoting NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 383 (1968)). The author also refers to a New York Times article which reported on how the small town of Dubuque, Iowa, with a population of about 60,000, 2% (331) of which were African-American, had experienced an emergence of hate groups (e.g., the Ku Klux Klan). Id. at 554-55 (citing Isabel Wilkerson, Seeking a Racial Mix, Dubuque Finds Tension, N.Y. TIMES, Nov. 3, 1991, at A1). One high school counselor quoted in the Times article asked, "[h]ow can we have a race problem when we don't even have minorities?" Id. at 555. Addis postulates that the problem was the "profoundly negative national identity of African-Americans sustained and reproduced by the cultural institutions of this country, such as the media." Id.

A U.S. Commission on Civil Rights report issued in the 1970s highlighted the problem of both the underrepresentation of women and minorities in television and the portrayal of both groups. U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION (1977). The report stated:

Television's portrayal of women and minorities and the potential impact of these portrayals are issues of critical importance to the American society. To the extent that viewers' beliefs, attitudes, and behavior are affected by what they see on television, relations between the races and the sexes may be affected by television's limited and often stereotyped portrayals.

Id. at 47. Seventeen years later, an advisory group to the Commission on Civil Rights discovered that not much had changed. See MINNESOTA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA (1994). The findings include the following:

1. The news media has tremendous influence on the attitudes of viewers and readers regarding race relations in this country. There is significant merit in allegations that the media presentation of news is biased when it comes to reporting on people or communities of color. Continuous biased presentations
what is good, is not solely a visceral reaction to first-impression stimuli, but a multilayered response based on all kinds of data previously processed and then applied to the current situation.\textsuperscript{219}

Who is considered beautiful,\textsuperscript{220} good, attractive,\textsuperscript{221} strong, bad, ugly, and unattractive\textsuperscript{222} in this society may seem to be whimsical and

foment unrest and contribute to racial polarization.

2. The unfair portrayal of minorities in the electronic and print media has produced negative self-images of people of color and it has bestowed upon white people an undeserved and destructive image of superiority.  
\textit{Id.} at 35; see also Camille O. Cosby, \textit{Television's Imageable Influences: The Self-Perceptions of Young African-Americans} 133 (1994) (concluding that negative images of African-Americans on television teach blacks to devalue and hate themselves and also instruct other ethnic people to dislike blacks).

\textsuperscript{219} See Devine, \textit{supra} note 160, at 5-7.

\textsuperscript{220} See West, \textit{supra} note 153, at 130. West contrasts the standards of beauty for women in America. He notes: "The ideal of female beauty in this country puts a premium on lightness and softness mythically associated with white women and downplays the rich stylistic manners associated with black women." \textit{Id.} The "Black is Beautiful" slogans of the late sixties and early seventies among people of African descent were a part of a cultural reprogramming done in an attempt to counter the centuries of psychic damage done to blacks, because they had been told in every way that they were inferior and that this inferiority was the result of their biological difference. The more a black could look white, and therefore beautiful, the more acceptable the person would be. Movie actress Lena Horne discusses how she had a difficult time dealing with the movie studios because she did not physically meet the Hollywood standards of how a black woman should look. In the 1942 movie \textit{Panama Hattie}, Horne sings a Spanish song, and the movie producers wanted to promote her as Spanish. When Horne refused to pass, the MGM studio decided to paint her so that she would look more "black." However, when \textit{Show Boat} needed a mulatto-looking woman for the role of Julie, Ava Gardner got the role using the "light Egyptian" makeup made for Horne. See \textit{A Century of Women, Image and Popular Culture} (TBS Productions 1994).

Blues queens, like Bessie Smith, provided a standard of beauty for working class black women in the 1920s. Because of her average looks, some women could identify with her. \textit{Id.} For a discussion of the connection between the beauty industry and racism see Kathy Peiss, \textit{Making Faces: The Cosmetics Industry and the Cultured Construction of Gender}, \textit{7 GENDERS} 143 (1990).

\textsuperscript{221} Attractiveness can refer to physical beauty as well as social attractiveness. \textit{See} Ford, \textit{supra} note 184, at 24. Ford states that social attractiveness can be "measured by an individual's ascribed or achieved characteristics." These measures include race, age, and social class. \textit{Id.}

\textsuperscript{222} Kalven and Zeisel conducted a study of jury trials for the years 1954, 1955 and 1958. Over 500 judges were sent questionnaires concerning 3576 trials. Harry Kalven, Jr. & Hans Zeisel, \textit{The American Jury} 33 (1956). In a questionnaire which was designed to compare the jury's actual verdict, a judge's hypothetical verdict and the judge's reasons for disagreements, \textit{id.} at 49, the researchers asked the following question:

As a person, did he (the defendant) create—
unpredictable on the surface. However, race is a powerful filter that colors and distorts our perceptions.223

Whether she is plaintiff or defendant, the black woman in the courtroom faces obstacles to being considered a believable,224 reasonable225 person. Because she is so far removed from the mythical

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Id. at 210.

Kalven and Zeisel found that the incidence of sympathy varied depending on the category of the defendant. For example, juvenile defendants had the highest sympathy factor. African-American defendants had the highest negative sympathy rating, "indicating that these defendants appear on balance unattractive to the jury." Id. The researchers concluded that an unattractive defendant has a converse effect on the jury, id. at 217, and whatever policy the jury may implement in factoring in the attractive-unattractive qualities of a defendant is most likely subliminal. Id. at 217-18.

223. See generally WEST, supra note 153.

224. Historically, a black woman's testimony was suspect. In Moseley v. State, 73 So. 791 (Miss. 1917), the Mississippi Supreme Court reversed the conviction of a black female defendant accused of violating the prohibition law because of the outrageous remarks made in the prosecutor's closing statement. The prosecutor said: "It is just a question of whether or not you believe this negro." Id. at 791. When the defense counsel objected the prosecutor said, "[s]he is a negro, look at her skin; if she is not a negro, I don't want you to convict her." Id. Instead of ruling on the objection, the trial judge asked, "[w]ell, what is she?" Id.

Even when an African-American woman who is obviously suffering from dementia is prosecuted, jurors may feel that the death penalty is appropriate. On Thanksgiving Day, 1980, Priscilla Ford drove her car down the sidewalks of Reno, Nevada, killing seven persons. Despite the fact that she told police officers that she was trying to kill as many people as quickly as possible, claimed to be Jesus Christ, and viewed victims as beasts, she was convicted of first-degree murder and sentenced to die. See Ford v. State, 717 P.2d 27 (Nev. 1986); Tom Kuncl & Paul Einstein, Ladies Who Kill 70 (1985). Experts had testified about her paranoid-schizophrenia. See Cy Ryan, UPI, June 27, 1985, available in LEXIS, Nexis Library, UPI File; Cy Ryan, UPI, Nov. 21, 1984, available in LEXIS, Nexis Library, UPI File. The Nevada Supreme Court stayed Ford's execution.

225. The labeling of Professor Lani Guinier, nominated by President Clinton to head the Civil Rights Division of the Justice Department in 1993, provides an example of how stereotypes were grafted to pressure President Clinton to withdraw her name. The charge was that Guinier was an unreasonable woman. Conservative activist Clint Bollick, litigation director for the Institute of Justice, accused Guinier of wanting racial quotas in judicial appointments. See Clinton's Quota Queen, WALL ST. J., Apr. 30, 1993, at A12; see also Lani Guinier, The Tyranny of the Majority, at ix (1994); Patricia J. Williams, The Labeling of Lani Guinier, CLEVELAND FREE TIMES, June 23, 1993, at 8. Guinier had criticized single-member voting districts because in her opinion, the process inhibited full participation by all persons, particularly African-American citizens. Bollick and other detractors called Guinier's views "profoundly undemocratic," "reverse racism" and "polarizing." GUINIER, supra, at ix.
The treatment of Anita Hill and Lani Guinier, two accomplished black female attorneys, by presidents, Congress, the media, and the public, demonstrates how the credibility of a black woman in a public forum can be called into question and how the stereotypes are used. Although not a trial, the Anita Hill/Clarence Thomas hearings illustrate how a well-respected, established black woman is vulnerable to attack when she challenges the veracity of a soon-to-be-appointed Justice of the United States Supreme Court. Justice Thomas used racial imagery (high-tech lynching metaphor) to deflect attention from the disputed facts of his alleged misconduct (sexual harassment of Anita Hill) while director of the Equal Employment Opportunities Commission. Hill received the verbal lashing of senators, and was portrayed not just as unworthy of belief, but as mad (a jezebel-sapphire combination). Toni Morrison explained Hill's predicament as follows:

[S]he was contradiction itself, irrationality in the flesh. She was portrayed as a lesbian who hated men and a vamp who could be ensnared and painfully rejected by them. She was a mixture heretofore not recognized in the glossary of racial tropes: an intellectual daughter of black farmers; a black female taking offense; a black lady repeating dirty words.

Whatever one's views about Guinier's writings, what cannot be missed is the use of stereotypical imagery to summon up fear, distrust, and to characterize Guinier as radical at best and crazy at worst. Williams quotes New York Post writer Ray Kerrison: "The Guinier nomination is the latest bid by the Clintons to paper the country floor-to-ceiling with leftist crazies." Williams, supra, at 8; see Lani Guinier, Keynote Address, 25 U. Tol. L. REV. 875, 882 (1995) (recounting how Guinier's hometown newspaper labeled her a "mad woman"). Bollick's use of the word "quota," which is a politically sensitive and divisive issue, and its juxtaposition with the word "queen," which when used to describe a black woman is typically in connection with real or imagined welfare fraud, produced an image of Guinier as unstable, untrustworthy, unreasonable, and unAmerican. See generally Who's Afraid of Lani Guinier, N.Y. TIMES MAG., Feb 27, 1994, at 40, 44.

226. See LOmE, supra note 119, at 116. For an analysis on how extreme the idea of racial perfection can be, see STEPHAN KULL, EUGENICS, AMERICAN RACISM AND GERMAN NATIONAL SOCIALISM (1994). Kull links the early eugenics movement in the United States to the ethnic cleansing of the Nazis during World War II. Kull states that eugenics was closely intertwined with racism and that the Nazis learned from American immigration policies and eugenics theories. Id. at 70. The Rockefeller foundation played a central role in funding eugenic research in Germany. Id. at 20.

227. RACE-ING JUSTICE, EN-GENDERING POWER, supra note 176, at xvi; see also Adele Logan Alexander, She's No Lady, She's a Nigger: Abuses, Stereotypes and Realities from the Middle Passes to Capitol (and Anita) Hill, in HILL-THOMAS HEARINGS, supra note 102, at 3.
Nell Painter finds that Anita Hill's identity as "a highly educated, ambitious, black female Republican imposed a burden on American audiences, black and white, that they were unable—at least at that very moment—to shoulder."228

African-American women's courtroom credibility issues have not gone unnoticed by scholars. Documented juror and judicial attitudes concerning the veracity of black women's claims of rape reveal that certain stereotypes are persistent, and these extra-legal factors inhibit the black female victim at trial.229 Researcher Gary LaFree conducted a


In the African-American community, the debate centered around the appropriateness of Hill's testimony. Opinion was split over whom to believe. Orlando Patterson concluded that if the alleged conversations took place, Hill should not have been disturbed by them because Thomas' language was "a way of affirming their common origins." See Orlando Patterson, Race Gender and Liberal Fallacies, 1 RECONSTRUCTION 65 (1992). The Patterson theory promoted the idea of Hill as Jezebel. Others criticized Hill for washing dirty laundry in public. She was seen as a "black-woman as traitor-to the race." See Painter, supra, at 204-205; see also CLARENCE THOMAS AND ANITA HILL, PUBLIC HEARING, PRIVATE PAIN (Frontline Video 1992).


Jurors are not the only actors in the criminal justice system that have verbalized racist stereotypes. Attacks on the credibility of black defendants and/or witnesses by officers of the court have sometimes been found to be reversible error and sometimes not. See A. Leon Higginbotham, Jr., Racism in American and South African Courts: Similarities and Differences, 65 N.Y.U. L. REV. 479, 529 (1990). Prosecutors have made subtle and not so subtle appeals to jurors to take race into account when making their decisions. In United States v. McKendrick, 481 F.2d 152 (2d Cir. 1973), a prosecutor made various racial remarks to bolster his case against a robbery defendant. The prosecutor, in describing his witness, said, "[a]gain I point to the fact she is a colored girl. She knows her own. She knows the young bucks in that neighborhood." Id. at 155. The prosecutor also talked about the maturity of other females in the community because one of the actors had a child at the age of 15. The implication was that all black girls in that neighborhood knew and were involved (perhaps sexually) with all black boys and therefore the witness should be considered credible. The court found that this statement, among others, was prejudicial and that the defendant was denied his constitutional right, under the Due Process Clause, to a fair trial. Id. at 156. In Peeples v. Richardson, 363 N.E.2d 924, 926 (Ill. 1977), the prosecutor made the following remarks: "We [whites] abide by the law—they [blacks] do not. That is the difference. They don't live in the same social structure that we do, that you and I do . . . . They would lie if one of their own is being prosecuted by white society." The court found
study of jurors in Indianapolis which revealed that jurors are less likely to render a guilty verdict when the complainant is a black woman. LaFree stated, "[p]erhaps jurors were influenced by stereotypes of black women as more likely to consent to sex, as more sexually experienced and hence less harmed by an assault. Or they may have simply accorded less priority to black victims' claims for justice." LaFree then cites a response of a juror who argued for an acquittal of an accused rapist. The juror said, "a girl of her age from that kind of neighborhood probably wasn't a virgin anyway." LaFree gives other examples of how alleged rapes of black women are discounted because of their race. He quotes one juror who said, "Negroes 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." If jurors find it difficult to believe that an African-American woman can be a bona fide rape victim, jurors may also refuse to accept the possibility that a black woman can be a battered woman who struck back to defend herself against her abuser.

V. AFRICAN-AMERICAN WOMEN DEFENDANTS AT TRIAL AND THE USE OF BATTERED WOMAN SYNDROME TESTIMONY: A USEFUL TOOL OR A HINDERANCE?

Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even truth has little chance unless a statement fits within the framework of beliefs that may have never been subjected to rational study.

We are considered evil, but self-sacrificing; stupid but conniving; domineering while at the same time obedient to our men; and sexually inhibited, yet promiscuous. Covered by what is considered our seductively rich, but repulsive brown skin,
Black women are perceived as inviting but armored. Society finds it difficult to believe that we really need physical or emotional support like all women of all races.\textsuperscript{234}

Much has been written about battered women who commit crimes and claim self-defense or coercion,\textsuperscript{235} and the inability of jurors to understand the complexity of their cases because of social mores and gender bias.\textsuperscript{236} As discussed in Part I, courts have allowed experts to explain the impact of battering on the woman’s actions, because although jurors think they understand domestic violence, the abusive relationship and a person’s response to battering is in some cases “beyond the ken of the jury.”\textsuperscript{237}

The convergence of race and sex provides an interesting intersection\textsuperscript{238} from which to analyze whether scientific data about how an African-American woman responds to violence is useful, or, conversely, whether such data further disadvantage African-American female defendants.\textsuperscript{239} In addressing these issues, the following questions must be asked and answered. First, can a black woman who is beaten by her current or past intimate partner experience the psychological, physical, and sociological phenomena now labeled as battered woman syndrome (or is this designation exclusive to white middle class women?). Second, when an African-American woman commits a crime and claims that she acted in self-defense because she was

\textsuperscript{234} WHITE, supra note 39, at 17.

\textsuperscript{235} The Fifth Circuit Court of Appeals has held that battered woman syndrome evidence is not admissible to prove a defense of duress. See U.S. v. Willis, 38 F.3d 170 (5th Cir. 1994); see also Meredith Blake, Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress, 9 Wis. WOMEN'S L.J 67 (1994).

\textsuperscript{236} See Schneider, supra note 8, at 230-31; see also ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE (1989).

\textsuperscript{237} Dyas v. United States, 376 A.2d 827 (D.C. 1977); State v. Hennum, 441 N.W.2d 793, 798 (Minn. 1989); Koss v. State, 551 N.E.2d 970 (Ohio 1990); see GILLESPIE, supra note 236, at 166-71; Lenore E. Walker et al., Beyond the Juror's Ken: Battered Women, 7 VT. L. REV. 1 (1982).

\textsuperscript{238} Professor Kimberle Crenshaw explains intersectionality as the various ways in which race and gender interact to shape the multiple dimensions of being black. See Crenshaw, supra note 75, at 1241. Crenshaw further states that the "concept of political intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas... the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism." Id. at 1251, 1252.

\textsuperscript{239} Congress has determined that training on the issues of sex stereotyping and myths concerning racial groups is necessary and thus is providing grants to entities to explore these issues. See Women's Act, supra note 75, 42 U.S.C.S. § 40412(13) (1994).
battered, what are the pragmatic and/or political realities of characterizing a black woman as a battered woman syndrome survivor?

As has been previously discussed, the prerequisite for experiencing post-traumatic stress disorder, of which battered woman syndrome is a subcategory, is exposure to extreme physical or psychological violence.\textsuperscript{240} Clinical tests can be administered to determine if a woman has symptoms that indicate that she has suffered from trauma.\textsuperscript{241} One researcher has found that race was a "relatively unimportant variable in terms of defining difference"\textsuperscript{242} in the experiences between white women and black women who were battered.\textsuperscript{243} However, the psychologist did note that black women in her sample, although abused, were less passive, or tougher, than the white women tested.\textsuperscript{244}

Not all persons, including women who are battered, will respond to brutality in the same way. Nevertheless, one can reasonably conclude that a significant group of women, regardless of their race, can react in similar ways to violence. The commonality of humanity and the shared experience of being violated transcends the social constructs of race and class. While the psyche and the body can tolerate certain levels of abuse, coping with violence is supposed to be an abnormal experience.

The issue is not whether a battered black woman can experience the trauma known as battered woman syndrome. The focus of the inquiry should be if she does, is her claim likely to be discounted even more than that of her battered white counterpart because of her race? In other words, while a black female defendant may be able to establish the clinical elements of post-traumatic stress disorder or battered woman syndrome, which results in learned helplessness, of what benefit is that

\textsuperscript{240} See discussion supra part I.

\textsuperscript{241} See Lynne Bravo Rosewater, The Clinical and Courtroom Application of Battered Women's Personality Assessments, in DOMESTIC VIOLENCE ON TRIAL, PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 86, 89-93 (Daniel J. Sonkin ed., 1987). Rosewater has used the Minnesota Multiphasic Personality Inventory as an objective tool to analyze battered woman. \textit{Id.} at 87. Rosewater readily admits that the Minnesota normals contained no blacks and were therefore skewed based on white norms. However, she also says that the test interpreters must account for the race of the individual test taker. \textit{Id.}

Rosewater's research included almost equal numbers of black and white women (54 and 58, respectively). She found that battered women directed their anger inward, suffered from a sense of alienation and failure, were fearful of others, drained, and that the ability to think clearly was affected. \textit{Id.} at 89. She states that her research confirmed the earlier findings of Lenore Walker that showed that battered women often "perceive themselves as lacking internal strength and are exceptionally pessimistic about their ability to cope." \textit{Id.} at 90.

\textsuperscript{242} \textit{Id.}

\textsuperscript{243} \textit{Id.}

\textsuperscript{244} \textit{Id.}
diagnosis, when at trial\(^{245}\) she must compete with racial and cultural stereotypes that indicate that she is anything but "helpless?" Battered women who become defendants face an uphill battle in court. Under the law, when the claim is self-defense, the defendant must convince the jury that her actions were reasonable, that she believed that she was in imminent danger of death and/or bodily harm and that there was no other way of escape.\(^{246}\) The defendant's credibility is at issue because in cases where a woman has killed an intimate partner, juries often do not understand how an adult with the freedom to associate chooses to remain in a volatile relationship, or why the woman does not successfully cut all ties to the alleged abuser. Explaining the context of a woman's actions is important. Whether she defended herself in the midst of a violent confrontation,\(^{247}\) or struck back during a temporary lull in a beating episode (e.g., while he is asleep), jurors have believed that the woman was to blame for her battering and the death of her partner.\(^{248}\)

\(^{245}\) There are several hurdles that have to be cleared when a black female defendant is on trial. Many jurors will have the "us" vs. "them" attitude because most jurors do not have any idea of what it is like to face criminal sanctions. The more differences there are between the defendant and the juror, the harder it may be for the juror to relate to the circumstances. The other impediments for jurors to seeing the defendant as "one of us" include race, sex, and class.

\(^{246}\) The self-defense requirements in most states include elements of the following: 1) that the accused has not provoked the aggression; 2) that there is a real necessity that is imminent or immediate to save oneself from death or bodily harm; 3) that the force used was necessary to avert the harm; and 4) that the belief was reasonable.


Expert testimony on the nature of intimate violence and why a given defendant responded in a particular way may be needed to bolster the credibility of the defendant. This testimony can be used to explain the reasonableness of the defendant's action or her perception of imminent danger.

When a black female is facing trial for a crime that she says was committed in connection with domestic violence, and the woman can legitimately claim self-defense, her defense team must decide, among other things, whether the diagnosis of battered woman syndrome is appropriate, and whether, as a strategic matter, the defense team should offer testimony to explain why the woman acted reasonably under the circumstances (i.e., did not, or could not leave or sever all ties to the abuser).

“Learned helplessness” may or may not be an issue. If the woman's response to the batterer's actions is understood as traditional self-defense, a helplessness claim may confuse the jury and cloud the issue. However, if the jury is going to hear an expert explain how the defendant was “helpless,” (in that she could not get out of the relationship or that he would not stop beating her even after she had separated herself from him), the defense team should be aware that this categorization, however scientific it might be, could be at odds with the contrary, pre-existing, persistent images (i.e., stereotypes) of black women. Therefore, the expert must be capable of first understanding, and then explaining, the cultural nuances that may make the woman appear to be able to take a different course of action. In other words, the defense team must be culturally competent. One expert may not be capable of testifying about psychological and cultural factors. A second expert may be needed to testify as to how the mythology concerning African-American women operates because educating all jurors, regardless of race, is critical. The presence of blacks on a jury does not ensure that the black woman will not be subjected to myths that may have been internalized by members of her own group. Some African-Americans may hold to "See discussion infra note 257 regarding the possibility of punishment based on the woman’s “traitor” status.

250. A recent Alameda County case illustrates how a black male prosecutor views “fat, black, braid-wearing,” women. Tanya Schevitz, Appeals Court Backs Banning of Fat Jurors: Black Attorney’s Challenge of 3 Black Women Upheld, S.F. EXAMINER, Feb. 8, 1995, at A1. Deputy District Attorney William Tingle was trying an attempted murder case involving a black defendant. Tingle removed three potential jurors. Tingle said that he removed the first juror because she had a nose ring and long braided hair. His reason was that he'd "always regarded braided hair as somewhat radical." As for the second black female juror, Tingle said, "[s]he's grossly overweight. She's got on a little tiny skirt . . . ." Tingle excused the third juror because of "braids, obesity, size." When asked whether race bias played a factor, Tingle said, "I'm black and I have a certain
the notion that black women do not tolerate abuse. Upon closer

criteria within myself on whether I allow certain black people on the jury.” He also said, “[y]oung, obese black women are really dangerous to me.” Id. The state appeals court upheld the decision to strike the women. The case has been appealed to the California Supreme Court.

In 1989, the California Supreme Court upheld the peremptory challenge of the prosecution’s removal of a black juror because she was “overweight and poorly groomed.” People v. Johnson, 767 P.2d 1047, 1054 (1989), cert. denied, 495 U.S. 941 (1990). The court’s rationale was that the fat black juror “might not have been in the mainstream of people’s thinking.” Id.

Lawyers do rely on their own instincts as well as more sophisticated techniques for selecting jurors. One expert had this to say about choosing jurors when there is a black defendant:

If the defendant is black, defense counsel should attempt to impanel a jury which is generally young, above-average occupation status, above-average income, well educated, politically liberal, not identified with organized religion or regular church attendance, and single. . . . J]urors of higher occupational status may not feel threatened by job competition from blacks, and, therefore, are more inclined to sympathize with a black defendant.

Salisbury, supra note 206, at 289.

251. See Sondra O’Neal, Inhibiting Midwives, Usurping Creators: The Struggling Emergence of Black Women in American Fiction, in FEMINIST STUDIES, CRITICAL STUDIES 139 (Terese de Lauretis ed., 1986). O’Neal comments:

White women are supposed to be the demure, submissive ones. That a black woman will stay put and let any man pulverize her without lifting a foot, finger, skillet (of boiling water, lye or ever-available hot grits), chair, knife or some other handy instrument of self-defense is indeed a neohistory of some other believer in passive resistance.

Id. at 140. But the reality of some battered African-American women is not reflected in O’Neal’s position. For a discussion about dealing with domestic violence by an African-American female theologian, see RENITA J. WEEMS, I ASKED FOR INTIMACY: STORIES OF BLESSINGS, BETRAYALS AND BIRTHINGS 72 (1993). Weems recounts her frustration and sadness in coping with the fact that two of her friends lived in abusive relationships. Cynthia Gillespie recounts the stories of Caroline Scott, the defendant in People v. Scott, 424 N.E.2d 70 (Ill. App. Ct. 1981), and Elizabeth Knott, another African-American woman who was convicted of killing her abusive husband. See GILLESPIE, supra note 236, at 1-7, 26-28.

Miles Davis, the legendary jazz musician, was very open about abusing his wife, Emmy award-winning actress Cicely Tyson. See MILES DAVIS WITH QUINCY TROUPE, MILES: THE AUTOBIOGRAPHY (1989). In one passage Davis brags about beating her:

One time we argued about one friend in particular, and I just slapped the shit out of her. She called the cops and went down into the basement and was hiding there. . . . The cop looked in the basement and came back and said, “Miles, nobody’s down there but a woman, and she won’t talk to me. She won’t say nothing.”

Id. at 366. The police laughed and joked with Davis before leaving. Tyson called the friend and told him she could not talk with him anymore. Then Davis said, “[b]efore I knew it I had slapped her again.” Id. For a reaction to this account and advice to African-American women on male-induced violence, see PEARL CLEAGE, DEALS WITH THE DEVIL AND OTHER REASONS TO RIOT 36-43 (1993).
examination, the facts and psycho-social reality may reveal that the woman had little or no alternatives under the circumstances.252

In preparing for jury selection, juror questionnaires are one approach in screening potential jurors and their biases.253 The responses can also be used to show the relevancy of the expert’s testimony. Among the questions that should be asked in the juror questionnaire are:

1. How do you believe that the race of the defendant will affect you?
2. Use four words to describe black people.
3. What have been your experiences with black people?
4. Do you have any black friends, co-workers, acquaintances?
5. Describe your relationship with each.
6. Describe the typical black family.
7. Use four words to describe black women.
8. True or False, black women are more likely than white women to become victims of domestic violence? Explain.
9. What does the phrase "racial prejudice" mean to you?
10. Do you think that racial prejudice no longer exists?
    If not, Why?

Once the defense team has the juror’s answers, it can better determine whether the juror is likely to understand the theory of the case, or just how much the juror will have to be educated. In voir dire, jurors may be reluctant to reveal their biases because of the dynamics of being

The abusive relationship of rock star Tina Turner and her former husband Ike is captured in a recent motion picture film. WHAT'S LOVE GOT TO DO WITH IT (Touchstone Pictures 1993); see also A Plea for Justice (Group Two, Inc. Production 1990) (two African-American women telling their stories of being beaten by their husbands and subsequently killing them).

252. I interviewed a forensic psychologist who testified in a case where a black woman was on trial for stabbing her common-law husband. The woman usually carried a knife, which was a damaging piece of evidence. The psychologist told me: “We had to explain to the jury why this woman should not be considered violent, even though she carried a weapon, and her partner was killed with a knife.” Interview with Dr. Patricia Ambrose, in Cleveland, Ohio (May 9, 1995). The murder weapon was a household knife. The defense team called several witnesses to testify that in that neighborhood carrying a knife was a part of the community standard. The defendant lived in dangerous surroundings and felt that having the knife was a necessity. The decedent’s abusive reputation was also a part of the court testimony and the defendant was acquitted.

in a group and the desire to be accepted. Requesting individual voir dire, at the very least on racial-gender issues, may minimize that tendency. Questions about prejudices may signal jurors to give the politically correct response even though they may actually hold certain biases. However, it may be more important to run the risk of alerting a potential juror about the search for prejudice than not to attempt to remove biased jurors or at least educate those that remain. In a battered woman case with a black female defendant, not only is it appropriate to pose questions about gender biases, but attitudes concerning African-American women should be probed as well.

254. See Anne Bowen Poulin, The Jury: The Criminal Justice System's Different Voice, 62 U. CIN. L. REV. 1377, 1428-29 (1994). For a discussion on how juror responses may differ when the voir dire is conducted by judges rather than attorneys, see Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 L. & HUM. BEHAV. 131 (1987). Jones concludes that there may be "implicit pressures in the courtroom toward conformity to a 'perceived standard' that differs depending upon who conducts the voir dire." Id. at 143.

255. See John B. McConahay et al., The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little, 41 LAW & CONTEMP. PROBS. 205 (1977). The authors stress that potential jurors are not above lying in order to be selected. McConahay was involved in the scientific selection of the jury in the Joan Little case. Little was an African-American female who was charged with first-degree murder in the stabbing death of Clarence Alligood, the white night jailer for the Beaufort County, North Carolina jail where Little was being detained. Id. Alligood was found dead in the cell, with semen on his leg and his pants and shoes outside the cell. Id. at 206. Little had escaped, but turned herself in. She claimed that Alligood had raped her and that she acted in self-defense. After a five-week trial she was acquitted. Id. The authors used an expert on body language, juror questionnaires, and a mathematical model to predict how predisposed a potential juror would be to either the prosecution or the defense. Id. at 216.

256. The Supreme Court has determined that questions about race in voir dire are appropriate in some cases. See Aldridge v. United States, 283 U.S. 308 (1931). Later cases have modified the extent to which the Due Process Clause of the Fourteenth Amendment requires that black defendants be allowed to probe for racial prejudice during voir dire. See Ristaino v. Ross, 96 S. Ct. 1017 (1976); Ham v. South Carolina, 409 U.S. 524 (1973).

Mimi Steward challenges the assumptions lawyers make about their clients and how the Model Rules may not protect clients from such assumptions. See Mimi Steward, Just Injustice, 12 NAT'L BLACK L.J. 230 (1993); see also Cheryl Blackwell Bryson, The Right to Question Jurors on Racial Prejudice, 37 OHIO ST. L.J. 412 (1970).

While cultural differences are not insurmountable, whites are at a distinct disadvantage in fully understanding some aspects of black culture because of the degree of separation from blacks and the stigma attached to certain aspects of black life. Knowles and Prewitt explain:

Black people living in ghettos isolated from white society have developed styles of grooming and dress, a vocabulary, and a set of traditions that are strange and incomprehensible to most whites. A white jury called upon to
There may not be a one-to-one correlation between seeing a black woman as a strong matriarch; or as an alluring, provocative Jezebel; or as a punishing, provoking Sapphire; or as a welfare cheat, and seeing the defendant as violent.\(^{257}\) If one were to accept the common mythology of making these associations, evaluating the evidence surrounding an incident involving black people in their own community faces a very difficult task because of this cultural barrier.\(^{257}\)


There could be black jurors who feel that killing a black man is a type of treason to the black race. The black woman may be seen as a traitor who needs to be punished, regardless of her circumstances. This sentiment may be stirred because of the belief that the dominant society views black life as cheap and devalued. Thus, a black female should never take the life of a black male. See Hawkins, supra note 74.

The fear of being accused of betrayal can even be held by an African-American woman who is battered. A few years ago I visited several women in a California prison who had been convicted of killing their husbands. One African-American woman had been married to a doctor who practiced in a small California community. Because there were so few blacks there and because her husband held a prestigious job, the woman was reluctant to report his abuse. She told me of her dilemma of having to choose between bringing down a black man and embarrassing herself and the black community and putting up with the abuse. She chose the latter until one day she felt it was either his life or hers. She decided to strike back and live. This woman was among several who petitioned California Governor Pete Wilson for clemency. To date, she remains in prison.

The strong negative reaction by some African-Americans to the movie adaptation of Alice Walker’s *The Color Purple* provides an example of how race trumps sex. In *The Color Purple*, Celie, the main character, is physically and sexually abused by a stepfather and by her husband (Mister), both African-American men. After years of physical and psychological torment, Celie finally decides to leave Mister. The story concludes with Mister attempting to redeem himself by performing a good deed which results in Celie being reunited with her children, who had been taken away from her, and a sister that had been forced to flee the sexual advances of Mister.

When the movie premiered, there were protests from some in the black community because they felt that the movie portrayed black men in a bad light. See Jack Matthews, *Some Blacks Critical of Spielberg’s Purple*, L.A. TIMES, Dec. 20, 1985, at G1; Jacqueline Trescott, *Passions Over Purple: Anger and Unease over Film’s Depiction of Black Men*, WASH. POST, Feb. 5, 1986, at C1. Trescott writes, "Purple celebrates the tenacity and love of black women. But it only belatedly shows that men, particularly Mister, can change. And that, to many black men, smacks of betrayal." Id. While the movie was nominated for 11 Oscars, it received no awards. See "Color Purple" *Suffers Stinging Oscar Defeat*, UPI, Mar. 25, 1986, available in LEXIS, Nexis Library, UPI File. Some speculate that the criticisms by a few vocal blacks may have been the reason. See *Seeing Red over Purple: Cries of Sham, Snubs and Racial Stereotyping Raise a Ruckus That May Trip Up Spielberg’s Opus on the Path to Oscar*, PEOPLE, Mar. 10, 1986, at 102. Eldridge Cleaver, the former Black Panther and author of *Soul On Ice*, who had admitted to rape in his militant days as an act of protest, called "[t]he treatment of black men . . . reprehensible." Cleaver also called the film "a black lesbian attempt to debase black men." Vernon Scott, *The 58th Academy Awards: Color Purple* ‘Makes Black Men See Red’, UPI, Mar. 23, 1986, available in LEXIS, Nexis Library, UPI File. Johnny Cochran, who years later would become the lead attorney defending O.J. Simpson in
about black males, a black female defendant on trial for murdering her partner should benefit from a juror's perception that black men are violent, assuming that the alleged aggressor was a black male. But, when a juror is trying to reconcile what he or she believes about African-

Simpson's double murder trial, found that the film was well acted, but "didn't think the film had any redeeming values." Id.


Ntozake Shange's work also engendered criticism when it was produced as a play because the portrayals of black men were less than flattering. See Shange, supra note 117. The film Waiting to Exhale, based on Terry McMillan's novel, is also being criticized as black male bashing in some circles. See Louis B. Parks, Exhale Stars Happy to Show Black Success, THE PALM BEACH POST, Dec. 25, 1995, at 1D.

Race solidarity, the treatment of African-American men and the credibility of a black female beauty queen were debated in the African-American community during the trial of heavyweight boxer Mike Tyson. Tyson was convicted of the rape of Desiree Washington. However, 68% of black women and 66% of black men polled in Indianapolis believed Tyson was unfairly convicted. Kevin Brown, The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington, 4 U. ILL. L. REV. 997, 999 n.3 (1992) (citing the Indiana University Public Opinion Laboratory poll). Brown articulates the sentiments of some: "[d]on't cooperate with the Man in taking down a Brother, even if you think he is wrong, especially one who is a celebrity." And: "[y]our concern about your bodies and how males inflict pain on you has to be subordinated until the racial problem is resolved." Id. at 1005.

The insensitivity to the nature of Tyson's crime was demonstrated when a welcoming committee planned a celebration for Tyson's release from prison. See Bob Herbert, Welcome Home, Convicted Molester, N.Y. TIMES, June 10, 1995, at 19. The gala was scaled back when a group known as African-Americans Against Violence called for a silent vigil to commemorate black female victims of violence. See Tyson Homecoming Gala Criticized, NPR, Weekend Edition, June 17, 1995, available in LEXIS, Lexis Trans. #1123-13.

However, because in most situations the black male is dead, he may become a raceless victim, and whatever disdain a juror might have had for a black male could be neutralized because he no longer exists. Another bigoted attitude could be that both the defendant and the decedent were bad actors, so why not get rid of both of them. One racist juror had this to say about a black defendant, "Niggers have to be taught to behave. I felt that if he hadn't done that, he'd done something else probably even worse, and that he should be put out of the way for a good long time." See Dale W. Broeder, The Negro in Court, in RACE, CRIME, AND JUSTICE, supra note 256, at 301, 303. Although the defendant in this case was a black male, the attitude expressed is not necessarily gender specific.
American females and what is perceived as helplessness, the typical images of black women may be a barrier to seeing the defendant as not culpable (either because of her strength of character, or her suspect character) for the violent encounter(s). Jurors have to be educated about how a black woman can be economically independent and yet emotionally dependent or "trapped" in a relationship. An African-American female's psychological disposition or practical circumstances may run counter to the notion that she is in control.

VI. LEGISLATIVE INITIATIVES

Chief Justice Marshall stated in *Fletcher v. Peck*\(^{260}\) that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."\(^{261}\) Legislatures have used social science research to inform the law. For example, at the federal level, the Equal Pay Act,\(^{262}\) the Voting Rights Act,\(^{263}\) and the Violence Against Women Act\(^{264}\) are but a few examples of where the legislature relied upon the social sciences to make changes in the law. One former judge opined that the legislature is the better forum for social science research when compared to the courts.\(^{265}\)

States legislatures have amended their evidence codes to reflect the acceptance of social science research. A few jurisdictions expressly allow testimony on battered woman syndrome at trial.\(^{266}\) For example,

259. The ability to hold a job as indicia of not being victimized had been raised in the Hedda Nussbaum tort case. *See Abuse Aftermath, Love Battery and the Statute of Limitations*, NAT'L L.J., Jan. 9, 1995, at A12. Joel Steinberg's attorney cross-examined Nussbaum regarding the fact that she worked for Random House publishers. The point was to show that Nussbaum was independent, and therefore not a victim of battering by Steinberg.
260. 10 U.S. (6 Cranch) 87 (1810).
261. Id. at 136.
265. *See* Abner J. Mikva, *Bringing the Behavioral Sciences to the Law: Tell It to the Judge or Talk to Your Legislator?*, 8 BEHAVIORAL SCI. & L. 285 (1990). Judge Mikva suggests that the legislature is the better arena for social science research because it can respond more quickly to the changes in research. Legislatures also do not have to wait on a "live controversy" before taking action and are not bound by issues, parties and evidence like the courts are when deciding cases. *Id.* at 287.
California allows expert testimony to be used by the prosecution or the defense. Nevada allows evidence of domestic violence at trial when a person has killed another in self-defense. Louisiana also permits the character of an alleged batterer and acts of violence in the domestic situation to be introduced to prove the accused's state of mind.

Other states have a more traditional approach to allowing introduction of evidence of an aggressor's behavior at trial. As states grapple with what is the best way to ensure fairer trials concerning domestic disputes and battering-induced crimes, the question that will surface is whether the battered woman syndrome is expansive enough to sufficiently explain the range of circumstances a battered woman may encounter or the variety of reactions the abused may have to being battered.

One way legislatures can assist courts and juries in moving beyond thinking about battered women as only one type (i.e., weak, passive, abnormal) is to provide language that would admit various types of battering evidence. This would include expert testimony on battered woman syndrome, and on post-traumatic stress disorder. There may be cases where the battered woman syndrome/learned helplessness diagnosis is most appropriate. However, in the situations where learned helplessness may trigger unfair, biased comparisons to a mythical battered woman, or where the facts do not warrant a syndrome diagnosis, but the spouse testimony, which includes battered woman syndrome. See Md. Code Ann., Cts. & Jud. Proc. § 10-916 (1994).


270. For example, in Connecticut evidence of a pertinent trait of the character of the victim is admissible as an exception to the rule that character evidence is generally not admissible. The evidence can be offered by the accused or the prosecution, especially in homicide cases. See Conn. Gen. Stat. Ann. § 404 (West 1993). Oregon has a similar provision. See Or. Rev. Stat. § 40.170 (1993). In North Carolina, evidence of former threats against the defendant by the person who alleges assault, or assault and battery can be admitted to show that the defendant acted reasonably in defending herself. See N.C. Gen. Stat. § 14-33.1 (1993).

The Texas character evidence rule generally excludes testimony about the person's character or trait. However, one provision allows evidence of the violence of the alleged victim or of assaultive conduct when a party accused of assaultive conduct is claiming self-defense. See Tex. Rev. Civ. Stat. Ann. art. IV (West 1994).
woman's actions still need to be explained as excusable or justified.271 A broader admission standard is warranted.272

CONCLUSION

Domestic violence has existed for millennia. This universal phenomenon is becoming taboo in some cultures. Social science and the law, among other institutions, are grappling with why women are beaten, how to stop the brutality, and the extent to which women will be allowed to protect themselves from their intimate partners.

The battered woman syndrome, which in most American jurisdictions passes the scientifically valid legal standard of admissibility, is not the definitive explanation in every situation where a woman kills her abuser or commits a crime that can be connected to abuse by a partner. The potential for stigma is acknowledged and problematic. However, it seems premature and cavalier to jettison a trauma theory which is akin to other valid explanations of how humans respond to violence, just because it might not apply to all battered women. Until domestic violence ceases to be a social problem or until battered women are given adequate protection and support, courts and legislatures, who make and interpret the laws about what is relevant testimony, must expand their knowledge and acceptance of the type of information needed to ensure that when a battered woman is charged with a crime, the decision about her guilt or innocence is not based on either myth or partial information concerning her circumstances.

A battered African-American female defendant is entitled to no less than her white female counterpart. In fact, because of who she is, in addition to what she may have done, both judges and juries may need even more insight in order to understand her actions. To suggest that there is something innate that immunizes her from the impact of violence is to summon up the mythology that was used to justify slavery. African-American women are often forced to cope with violence in different ways. However, African-American women who are beaten suffer physical, psychological, and sexual injury, just like other human beings. This reality must be acknowledged not only in society, but in our criminal justice system as well.

272. One clinical psychologist suggests that a better approach is to use the term "battered women's experiences." See Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 HOFSTRA L. REV. 1191, 1194 (1993).
[Editor's Note, May 1998: Daria Ibn-Tamas contends that her brief discussion with the author was not a formal interview and that the author misstated facts in addition to propounding her own theory about the dynamics of Dr. and Mrs. Ibn-Tamas's relationship.]