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Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women

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BIASES BEHIND SEXUAL ASSAULT: A THIRTEENTH AMENDMENT SOLUTION TO UNDER-ENFORCEMENT OF THE RAPE OF BLACK WOMEN

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INTRODUCTION

Devaluation of Black women's bodies derives from the long history of slavery in this country.[1] The treatment of Black women, from slavery to the present, ties closely to the systemic tactics of oppression utilized by White slave owners after our country's founding.[2] In removing autonomy and control over Black female slaves' bodies, slave owners ensured that any offspring borne from the rape of a Black slave would become indoctrinated into slavery.[3] Though Congress provided options to remedy the unconscionable, disparate treatment of the races by passing the Thirteenth and Fourteenth Amendments to the Constitution,[4] the broad "badges and incidents" of slavery persist,[5] coloring the treatment of Black women many years after abolition.

Sexual assault deeply affects victims, changing their lives forever. Scholars have written that rape "breaks the spirit, humiliates,

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[1] *See infra* Part II.

[2] *See infra* Part II-A.

[3] Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 9–10 (2006).

[4] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431–32 (1968) (discussing Senator Trumbull's desire to pass a more "sweeping and efficient" bill after the ratification of the Thirteenth Amendment, specifically one to "give[s] effect" to the declaration that all persons should be free) (internal quotation marks omitted).

[5] Civil Rights Cases, 109 U.S. 3, 20 (1883).

tames, [and] produces a docile, deferential, obedient soul."[6] Rape degrades,[7] oppresses,[8] and instills fear.[9] It does not relent, as the lingering effects of rape remain in a victim's life: "resolution of the trauma is never final; recovery is never complete."[10] Rape also affects more than just the victim: It ripples out to entire communities.[11] Victims of rape struggle to heal after the trauma and their connected circles of family and friends suffer with them.[12]

Today, sexual assault crimes pose a great threat to the safety and well-being of Black women. Police and prosecutors both have significant discretionary powers to investigate these crimes.[13] Unfortunately, implicit, unconscious biases plague our criminal justice system and in turn adversely affect law enforcement's handling of sexual assault crimes.[14] Black women in particular suffer the consequences of law enforcement's discretionary power[15] and have historically been victimized by law enforcement.[16] Crimes against Black women are poorly

[6] SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 11 (2015) (quoting Claudia Card, *Rape as a Weapon of War*, 11 HYPATIA 5, 6 (1996)).
[7] *Id.*
[8] *See* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 18 (1981) ("Rape was a common method of torture slavers used to subdue recalcitrant black women."); Jeffrey J. Pokorak, *supra* note 3, at 4 (discussing the "undervaluation of all rape offenses against Black women").
[9] ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 7 (Duke Univ. Press 2015) (2005) ("Rape is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.") (quoting SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 15 (Fawcett Books 1993) (1975)).
[10] DEER, *supra* note 6, at 12 (quoting JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR 211 (Basic Books 1992).
[11] *Id.* at 109.
[12] *Id.* at 10.
[13] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 15 (1998).
[14] *Id.* at 16 ("At every step of the criminal process, there is evidence that African Americans are not treated as well as whites – both as victims of crime and as criminal defendants."). *See* Pokorak, *supra* note 3, at 40 (discussing the "serious impact on the nature of prosecution" juror biases and stereotypes have on prosecutorial discretion because of the "prosecutors' downstream orientation and system outcome bias").
[15] *See* Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 41 (2017) ("Black women's interaction with the state, through law enforcement, is marked by violence.").
[16] *See generally* ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017) (offering a detailed examination of police violence against Black women and LGBTQ people of color).

investigated and sometimes ignored altogether.[17] When police actually attempt to investigate alleged crimes against Black women, they often believe the victims are not credible.[18] Further, the few sexual assault crimes that actually lead to police charges are frequently not pursued by prosecutors.[19] Whether the disparity arises from unconscious or intentional biases, it inflicts harm on Black women by denying them access to justice.

Part II traces the history of this country's degradation of Black women's bodies and assesses how historical abuses continue to shape the experiences of Black women with respect to the full enjoyment of their rights as enshrined in the Thirteenth Amendment,[20] the 1866 Civil Rights Act, and 42 U.S.C. § 1981.[21] Part III outlines the Thirteenth Amendment[22] as the best method for addressing oppression[23] and control over Black bodies because of the Amendment's historical grounding and its unburdened status compared to the Fourteenth Amendment.[24] It further connects the Thirteenth Amendment with the history of depriving Black women the fundamental human right to bodily autonomy.[25] Part III-C addresses the seminal Supreme Court decisions that initially limited the viability of Thirteenth Amendment arguments, including the *Civil Rights Cases* and *Plessy v. Ferguson*.[26] Part III-D outlines the Amendment's practical implementation and resurrection in the courts, making particular use of the 1968 decision *Jones v. Alfred H. Mayer, Co.*[27] to show how critical the Amendment can be in the fight to protect the lives, safety, and rights of Black women.[28] Part IV presents potential remedies, including: (1) a call to action for practicing attorneys to implement Thirteenth Amendment arguments and increase their

[17] See RITCHIE, supra note 16; Kali Holloway, When You're a Black Woman, You're Never Good Enough to Be a Victim, JEZEBEL (Sept. 11, 2014, 2:40 PM), https://jezebel.com/when-youre-a-black-woman-youre-never-good-enough-to-be-1633065554 ("For black women who are raped, misogyny and racism often conspire to make victim an unattainable status.").

[18] Jacobs, *supra* note 15, at 49 (discussing the legal system's "unwillingness to find Black women credible").

[19] Davis, *supra* note 13, at 15–16.

[20] U.S. CONST. amend. XIII.

[21] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)); *see infra* Part II.

[22] U.S. CONST. amend. XIII.

[23] *See* Douglas L. Colbert, *Affirming the Thirteenth Amendment*, 1995 N.Y.U. ANN. SURV. AM. L. 403, 403 (1995).

[24] *See infra* Part III.

[25] *Id.*

[26] Civil Rights Cases, 109 U.S. 3, 20 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896).

[27] 329 U.S. 409 (1968).

[28] *See infra* Part III-D.

prominence in jurisprudence, (2) options for Congress to create laws intended to resolve discriminatory treatment of sexual violence against Black women, and (3) the option for Black women to seek civil tort actions as a means of redress.[29]

II. HISTORICAL CONTEXT FOR THE DEVALUATION OF BLACK WOMEN

A. Rape as a Tool to Dehumanize Black Slaves

To adequately understand the plight of Black women in our present-day context, we must pay particular attention to the way that Black women were treated during slavery.[30] Although our society, as well as our judicial system, seeks comfort in the false premise that it achieved fairness and equal opportunity with the abolition of slavery,[31] the vile constriction of the institution persists through intentional and unintentional biases against Black women.

White slave owners' treatment of Black slaves had few boundaries.[32] In fact, for much of history, raping a Black woman was not criminalized.[33] Masters raped and brutalized Black women without any legal recompense, furthering their own economic interests by increasing their number of slaves as the women gave birth to children of forcible rape.[34] One slave recounted:

> He told me I was his property, that I must be subject to his will in all things . . . . 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, violence, or even death.[35]

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[29] *See infra* Part IV.

[30] *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 18, 20 (2004) (discussing racial profiling as a product of slavery in the United States).

[31] *See* Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181, 1198 (2005) (noting the Supreme Court's tendency to "ignor[e] *all* aspects of American history" in the context of racial profiling) (emphasis in original).

[32] Pokorak, *supra* note 3, at 8–9.

[33] *Id.* at 6; HOOKS, *supra* note 8, at 35.

[34] Pokorak, *supra* note 3, at 10; HOOKS, *supra* note 8, at 16.

[35] RITCHIE, *supra* note 16, at 28.

Many slave owners had easy access to vulnerable female slaves; they frequently forced young Black girls to sleep in the same bedroom as themselves.[36] Although Black women were attacked and demoralized by their White masters, in turn increasing White male power and wealth,[37] White women failed to assist Black women because some felt resentment over their husbands' attention.[38]

These repugnant acts to dehumanize Black women continued for more than two centuries with a number of false justifications, including the lower status of Black people and a false narrative of Black sexual promiscuity.[39] As further rationalization for their actions, White slave owners began to characterize Black women as sexually lascivious and lewd.[40] Black women were portrayed as so inherently enticing that White slave owners could not be held accountable for their actions.[41] In systematically raping their female slaves, White masters achieved two goals: increase their power and dehumanize their property.[42] "[T]he right claimed by slaveowners . . . over the bodies of female slaves was a direct expression of their presumed property rights over Black people as a whole."[43]

Subjugation hardens and denigrates people.[44] The mentality of White slave owners created a lasting stereotype of Black women that contributes to their disparate treatment.[45] The systematic rape of Black slaves remains relevant to our present-day understanding of the problems facing Black women as the biases and judgments embedded themselves in modern consciousness.[46]

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[36] HOOKS, *supra* note 8, at 25.

[37] *Id.* at 16.

[38] *Id.* at 36.

[39] *Id.* at 36–37.

[40] Pokorak, *supra* note 3, at 9.

[41] *Id.* at 9–10.

[42] *Id.* at 10.

[43] RITCHIE, *supra* note 16, at 27–28.

[44] Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 13 MASS. REV. 81, 98 (1972) ("An intricate and savage web of oppression intruded at every moment into the black woman's life during slavery. Yet a single theme appears at every juncture: the woman transcending, refusing, fighting back, asserting herself over and against terrifying obstacles."); Sheryl Gay Stolberg & Jess Bidgood, *Some Women Won't 'Ever Again' Report a Rape in Baltimore*, N.Y. TIMES (Aug. 11, 2016), https://www.nytimes.com/2016/08/12/us/baltimore-police-sexual-assault-gender-bias.html.

[45] Pokorak, *supra* note 3, at 53.

[46] Michelle S. Jacobs, *2018 Special Issue: Enhancing Women's Effect on law Enforcement in the Age of Police and Protest: The Violence State: Black Women's Invisible Struggle Against*

Dred Scott v. Sandford serves as the quintessential starting point for an in-depth analysis of the disparate treatment of Black women in sexual assault crimes.[47] *Dred Scott*, widely condemned as an anti-canonical case,[48] cemented racist public sentiment in the law and sent a firm message that Black people were an "inferior class of beings" to Whites.[49] According to the Court, Black people historically had "no rights which the white man was bound to respect."[50] The decision, tactically written by Justice Roger B. Taney and cloaked in an originalist interpretation of the meaning of the word "citizen" in the Constitution,[51] further institutionalized racist ideology. The opinion ignored the unique experience of Black women and discussed the status of the Black race.[52] Still, the Court denied Black women personhood, increasing the severity of their historical oppression.[53] The effect of *Dred Scott* persists in the unfair treatment of Black women as they still struggle to obtain personhood.[54] Lawyers have an obligation to work to correct the bitter dregs of *Dred Scott*[55] and provide Black women with the security in their own person promised to every person in this country.[56]

Although White male assault on Black females critically impacted their experience throughout history, Black women also faced subjugation by Black men.[57] The rape of Black women by other slaves

Police Violence, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 39, 46–47, 51–52, 63–64 (2018).

[47] 60 U.S. 393 (1857).

[48] *See* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 76 (2006) ("*Dred Scott* is the key example in [the] anti-canon.").

[49] *Dred Scott*, 60 U.S. at 405.

[50] *Id.* at 407.

[51] *Id.* at 406–07.

[52] *Id.*

[53] A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 38–39 (Oxford Univ. Press 1978).

[54] Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systematic Racism – Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 401–02, 420–21 (2013) (explaining Black women's struggle to obtain personhood).

[55] *Dred Scott*, 60 U.S. 393.

[56] *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (1991)) (providing that citizens of "every race and color" shall have the same right to the "full and equal benefit of all laws and proceedings for the security of person and property").

[57] Pokorak, *supra* note 3, at 8; HOOKS, *supra* note 8, at 35 (citing EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 33 (Vintage Books 1976) (1972) ("Even when a black man sexually attacked a black woman, he could only be punished by his master, no way existed to bring him to trial or to convict him if so brought.").

was not criminalized.[58] In *George v. State of Mississippi*,[59] the Supreme Court of Mississippi overturned a rape conviction of a Black male slave and held that he could not be guilty of raping a Black female slave because it was not illegal.[60] At that time, a male slave could only commit rape of White women.[61] As an unfortunate consequence of decisions like *Dred Scott* and *George*, the legality of the assault of Black women,[62] along with the skewed justifications for assault,[63] persist in today's society as unconscious and unintentional biases that color how the public views rape crimes against Black women.[64]

B. Congressional Debates on the Thirteenth Amendment and Civil Rights Act of 1866

The Congressional Debates regarding the Thirteenth Amendment and the 1866 Civil Rights Act (the "Act") provide critical context for understanding the broad scope interpretation of the Amendment.[65] Referencing the debates, Justice Stewart once stated that the 34th Congress intended for the power under the Thirteenth Amendment to be broad and sweeping.[66] Congress passed the Act as the first exercise of its Thirteenth Amendment, § 2 power.[67] Illinois Senator Lyman Trumbull, a strong proponent of the broad interpretation of the Thirteenth Amendment, asserted that the Act strived to "break down all discrimination between black men and white men."[68] Further, Senator Trumbull believed that additional laws needed to be passed to stop the apparent problem of public biases furthering the oppression of Black people.[69] The 34th Congress intended the Act to forbid several forms of racial discrimination.[70]

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[58] Pokorak, *supra* note 3, at 8.

[59] George v. State, 37 Miss. 316 (Miss. Ct. App. 1859).

[60] *Id.* at 317, 320. *See* Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER L.J. 43, 49 (1992) ("The rape of a Black woman by any man was not a crime.").

[61] HOOKS, *supra* note 8, at 35 (citing EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 33 (Vintage Books 1976) (1972)).

[62] *Id.* at 35.

[63] *Id.* at 16.

[64] *See infra* Section II-C for a discussion on the modern treatment of Black women.

[65] Carter, *supra* note 30, at 72.

[66] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 429 (1968).

[67] Colbert, *supra* note 23, at 404.

[68] *Jones*, 392 U.S. at 432.

[69] *Id.*

[70] *Id.* at 435.

The Thirteenth Amendment allowed Congress to pass the Act.[71] The Amendment presents a powerful implement to address sexual violence against Black women because it allows Congress to identify lingering effects of slavery and enact legislation to remedy those effects.[72] The broad language and scope of the Act provides an example of the Thirteenth Amendment's power.[73] The Amendment was intended to guarantee freedom,[74] not in a restrictive sense limited to freedom from slavery, but instead in a broad sense that addressed all vestiges of slavery.[75] At the time of enactment, members of Congress held the view that the Act should be interpreted broadly.[76] Congressional debates on the Thirteenth Amendment showed vast support for the use of the Thirteenth Amendment to address systemic, ongoing inequities stemming from slavery.[77]

Many pro-slavery citizens reacted poorly to the progressive changes of Congress in 1865, unwilling to allow former slaves to enjoy equal status under the law.[78] Nonetheless, drafters and supporters of the Amendment viewed it as necessary because the abolition of slavery could not alone create true equality among the races.[79] This framing of the Thirteenth Amendment provides ample understanding of its intended use. Congress planned for a Constitutional provision that had the power to address any incidents or vestiges of slavery.[80] With such wide reach, the Thirteenth Amendment remains a powerful and "under-utilized"[81] remedy, including against the institutionalized dismissal of sexual assault crimes against Black women.

C. Present-Day Issue: Under-Policing and Under-Prosecution of Sexual Assault Crimes Against Black Women

[71] *See* U.S. CONST. amend XIII, § 2 (granting Congress the "power to enforce" the abolition of slavery by "appropriate legislation").

[72] *See* Carter, *supra* note 30, at 20 (noting that the Supreme Court has "long recognized that the Thirteenth Amendment" is meant to be used to "eliminate the lingering effects of the slave system").

[73] *Jones*, 392 U.S. at 426–27.

[74] Colbert, *supra* note 23, at 403.

[75] Carter, *supra* note 30, at 48.

[76] *Id.*

[77] *Jones*, 392 U.S. at 431.

[78] Pokorak, *supra* note 3, at 16.

[79] *Id.* at 17.

[80] *Jones*, 392 U.S. at 429.

[81] Colbert, *supra* note 23, at 405.

The hyper-sexualized stereotype of Black women that began during slavery[82] continues to exist and affects Black women's personhood. The self-assuring rationale used to justify White slave owners' systematic subjugation of Black women remains a modern-day vestige.[83] Further, Black women sit at the intersection of their race and gender, subject to "overlapping systems of subordination."[84] As a result, Black women have not historically been granted the same level of attention that White women have received following sexual assaults.[85] Public perception of race and rape can affect the extent of police investigations.[86] Statistics regarding the rape of Black women are flawed due to low rates of reporting,[87] but existing statistics are revealing. The U.S. Department of Justice released a report in 2013 compiling rape statistics that showed Black women suffered from attacks at a rate of 2.8 per 1000 whereas White women were attacked at a rate of 2.2 per 1000.[88]

Although the existing statistics reflect a slight disparity,[89] they are difficult to rely upon due to severe issues with underreporting.[90] In some cases, low reporting may result from a distrust of police.[91] Many

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[82] HOOKS, *supra* note 8, at 36–37; Pokorak, *supra* note 3, at 9.

[83] *See* Pokorak, *supra* note 3, at 10 (detailing the justifications used by slave owners to abuse Black women).

[84] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244, 1265 (1991). In her piece, Crenshaw offers the example of the Central Park jogger, a White woman who was sexually assaulted in 1989. Other rapes occurred in the same week in New York, including a violent gang rape of a Black woman. While the Central Park jogger splashed headlines, women of color were not granted the same level of the public's sympathy. *Id.* at 1268.

[85] *Id.* at 1268.

[86] *See e.g.* Toni Irving, *Decoding Black Women: Policing Practices and Rape Prosecution on the Streets of Philadelphia*, 20 NWSA J. 100 (2008) (discussing how black women are "generally displaced as victims of rape" and examining the way "personal narratives of rape victims are structured by competing and overwhelming sociolegal narratives that undercut their reception"); Vicki McNickle Rose & Susan Carol Randall, *The Impact of Investigator Perceptions of Victim Legitimacy on the Processing of Rape/Sexual Assault Cases*, 5 SYMBOLIC INTERACTION 23 (1982) (examining the "interpretive process in which police investigators engage as they construct certain types of victim and case characterizations").

[87] *See* Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, U.S. DEP'T OF JUSTICE 2 (2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf ("Most rapes and sexual assaults were not reported to the police.").

[88] MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 3 (2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf.

[89] *Id.*

[90] *Id.* Of particular note in the DOJ report is the alarming statistic that American Indian women are raped at a rate of 4.5 per 1000 people. *Id.* The reported statistic is marked as cautionary as the statistic is either based on fewer than 10 cases or has a variation above 50%, so the conclusion may not be reliable. *Id.*

[91] Taslitz, *supra* note 31, at 1190.

Black women struggle to trust police due to a history of unfair treatment, including being coerced into sexual favors to avoid criminal charges[92] or even sexually assaulted outright.[93] Black women may feel less comfortable approaching police officers after being attacked than White women, resulting in lower than accurate statistics on total rapes perpetrated against Black women.[94]

In 2015, the Department of Justice concluded a lengthy investigation of Baltimore City for numerous unconstitutional and unacceptable practices, including grossly inadequate investigation of rape allegations.[95] The federal report focused on the Baltimore City Police Department and the many instances in which the department derisively disregarded forcible rape allegations made by women in the predominantly African American city.[96] In one instance cited in the report, when a victim attempted to discuss her case with a Baltimore City police officer, he challenged her by asking, "Why are you messing that guy's life up?"[97] According to the DOJ investigation, the city police officer rejected the victim's claims and focused instead on how the alleged rapist's life would be affected rather than recognizing the immense difficulties of her attack.[98] Another officer in the Baltimore Police Department indicated that "all [their] cases were bullshit."[99] In addition to the inadequacy of police officers' investigations, many rape kits sit untested, even though they contain evidence gathered through invasive physical examinations of victims immediately after traumatic attacks.[100] Of all the rape kits collected, fewer than one fifth actually get tested.[101]

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[92] Stolberg & Bidgood, *supra* note 44.

[93] *See generally* RITCHIE, *supra* note 16, at 106–26 (detailing specific instances of sexual violence perpetrated by police officers against women and LGBTQ people of color).

[94] *See id.* (discussing why Black women may feel less comfortable approaching police officers). *See also* Taslitz, *supra* note 31, at 1190 (detailing how 65.8% of Black people indicated they had low confidence that police would treat them the same as white people and five times as many Black people reported mistreatment at the hand of police officers than White people).

[95] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, 122–27 (2016), https://www.justice.gov/opa/file/883366/download [hereinafter *Investigation of the Baltimore City Police Department*]

[96] *Id.* at 122 (noting that BPD detectives ask questions "suggesting that they discredit the reports of victims who delay" in reporting and display "undue skepticism of reports of sexual assault"); *Quick Facts: Baltimore city, Maryland (County)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/baltimorecitymarylandcounty#qf-flag-NA (last visited Jan. 1, 2018) (indicating that the percentage of Black people living in Baltimore City is 63%).

[97] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 95, at 122.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 123–24.

[101] *Id.* at 124.

These rape kits can implicate any number of prior offenders with DNA currently in the system or point to new suspects, but city police leave them sitting untested.[102] The findings by the Department of Justice revealed that the police treated the claims of women in the 63% African American city[103] as invalid and not credible.[104] By simple inference, the majority[105] of the untested rape kits were collected from Black women and went to waste.

Not only did the Department of Justice find the Baltimore City Police Department's investigative practices well below constitutional standards, it also cited multiple examples of ineptitude on the part of city prosecutors.[106] Prosecutors laughed with police officers about claims of sexual assault reported by city women.[107] In one instance, a city prosecutor discussed a case with the arresting officer, complaining that he was "not excited about charging it" and that the victim "seemed like a conniving little whore."[108] The disregard, disdain, and incredulity towards women's reports of sexual assault in a majority Black city[109] create an almost palpable affirmation that Black women are second class citizens, if they are considered citizens at all. The police department's routine under-investigation of sexual assaults[110] cripples victims' ability to get justice for serious crimes in a majority Black city and demonstrates deep ties to the historical treatment of Black women. If society harbors the belief that Black women are inherently lustful and incapable of being raped,[111] then it follows that police officers and prosecutors

[102] *Id.*

[103] *See* Stolberg and Bidgood, *supra* note 44; *Quick Facts: Baltimore City, Maryland*, *supra* note 96.

[104] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 95, at 122–23.

[105] *See* Stolberg & Bidgood, *supra* note 44 (noting that from 2010-2014, rape kits were tested in only 15% of Baltimore sexual assault cases).

[106] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 95, at 122.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 124–25.

[110] *See id.* at 123 ("[The Baltimore City Police Department] seriously and systematically under-investigates reports of sexual assault . . . .").

[111] BARRETT J. FOERSTER, RACE, RAPE, AND INJUSTICE: DOCUMENTING AND CHALLENGING DEATH PENALTY CASES IN THE CIVIL RIGHTS ERA 77 (Michael Meltsner ed., 2012). Although the book primarily focuses on the struggle of Black men in their own White rape narrative, it outlines a case study in Alabama that proves helpful in understanding the disparate outcomes of cases with Black victims. In 1964, seventeen counties in Alabama were surveyed. In 130 rape cases with a Black male defendant, the death sentence was used twenty-one times. In sixty-two rape cases with White defendants, only one resulted in a death sentence. None of the victims in any of the twenty-two cases resulting in death sentences were Black women. In the seventy

would also have a hard time believing a Black woman who states she was attacked. Police officers would then feel less inclined to investigate sexual assault crimes against Black women, leading to unfair outcomes in the justice system.[112]

A particularly disturbing scenario arises when members of law enforcement leverage their position of authority to target Black women in sexual assaults.[113] Daniel Holtzclaw, a part White, part Asian-American police officer from Oklahoma City strategically targeted Black women from a low-income neighborhood in a series of sexual assaults.[114] Mr. Holtzclaw deliberately sought Black women, some with criminal backgrounds, who he believed were less likely to receive help should they report his despicable actions.[115] A victim stated, "I didn't think nobody was going to believe me anyway . . . . I'm a drug addict."[116] The prosecutor in the case against Mr. Holtzclaw stated, "He counted on the fact no one would believe them and no one would care."[117] Black women are in the unfortunate and unjust position of being targeted by attackers who seek to exploit their societal vulnerabilities to avoid prosecution. Moreover, members of the police force, agencies meant to protect and serve the citizens of the United States, know that Black women routinely do not receive justice for sexual assault crimes perpetrated against them and have, in some shameful cases, used that knowledge to orchestrate further victimization.[118] Vestiges of slavery persist and Black women are continuously dehumanized through both these deliberate actions and through subtle biases.

III. LEGAL ANALYSIS

cases with Black female victims studied, there were no death sentences ordered. Cases involving the rape of White women resulted 22-25% of the time in a death sentence. *Id.*

[112] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 95, at 122–27.

[113] *See generally* RITCHIE, *supra* note 16 (detailing police violence against Black women and LGBTQ people). "In the past decade a law enforcement official was caught in a case of sexual abuse or misconduct at least every five days." *Id.* at 109.

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

[115] Dave Philipps, *Former Oklahoma City Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015), https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html; *see* RITCHIE, *supra* note 16, at 105–08 (discussing the Holtzclaw case and its implications).

[116] RITCHIE, *supra* note 16, at 107 (quoting a victim identified by the initials T.M.).

[117] Philipps, *supra* note 115.

[118] *Id.* (noting that Holtzclaw "singl[ed] out poor, black victims with criminal backgrounds whose stories would not be believed").

A. The Thirteenth Amendment

The Thirteenth Amendment constitutes a broad method for fighting long-held, deeply-rooted injustices against Black people.[119] The Amendment, broken into two sections, states:

> **Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[120]
>
> **Section 2.** Congress shall have power to enforce this article by appropriate legislation.[121]

Drafters of the Thirteenth Amendment intended it be used to remedy many of the societal maladies left after slavery.[122] In fact, Abraham Lincoln equated the passage of the Thirteenth Amendment to securing and safeguarding the rights intended in the Declaration of Independence.[123] The second section of the Thirteenth Amendment,[124] the Enabling Clause, grants Congress the broad power to create legislation rectifying any remaining badges or incidents of slavery.[125] This power allows Congress to remedy any ongoing race-based social disparities actualized during slavery that inhibit the rights of Black people, including the right to be secure in your own person.[126]

Denying Black women their right to be secure in their own person bears a strong connection to the treatment of Black women throughout our nation's history.[127] Over 150 years after the abolition of slavery, Black women continue to be subjected to assault at higher

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[119] Carter, *supra* note 30, at 20.
[120] U.S. CONST. amend. XIII, § 1.
[121] U.S. CONST. amend. XIII, § 2.
[122] *See* discussion *supra* Section II-B.
[123] DONALD LIVELY, THE CONSTITUTION, RACE, AND RENEWED RELEVANCE OF ORIGINAL INTENT: RECLAIMING THE LOST OPPORTUNITY OF FEDERALISM 41 (2008).
[124] U.S. CONST. amend. XIII, § 2.
[125] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).
[126] *See generally id.* (recognizing broad Congressional authority to cure race-based social disparities).
[127] Pokorak, *supra* note 3, at 7–8.

rates than White women.[128] Congress created the Thirteenth Amendment to rectify unjust treatment nurtured by the bonds of slavery.[129] The Thirteenth Amendment provides an opportunity for Congress to repair the ills surrounding slavery[130] and the disproportionate attack of Black women, maintained throughout the centuries, constitutes a surviving malignancy that our judicial system needs to resolve. The first legislation passed using Congress' Enabling Clause powers helps one understand the Thirteenth Amendment as an option for combating racial injustice.[131] Key decisions, including the Civil Rights Cases, Plessy v. Ferguson, and Jones v. Alfred H. Mayer, Co., provide further insight as to how the Thirteenth Amendment should be used to aid Black women.[132]

B. The 1866 Civil Rights Act

The first utilization of the Thirteenth Amendment, the 1866 Civil Rights Act,[133] provides a sound example of the 34th Congress' intentions.[134] Presently, the language of the Civil Rights Act of 1866 is codified in 42 U.S.C. §§ 1981–1982.[135] Of particular significance is the phrase contained within both the original Civil Rights Act and § 1981, "the full and equal benefit of all laws and proceedings for the security of person."[136] This section specifies a right intended to be protected by the Act: the right to the security of one's person.[137] The high rate of sexual assault against Black women stands in direct

[128] PLANTY ET AL., *supra* note 88.

[129] *See* discussion *supra* Section II-B.

[130] U.S. CONST. amend. XIII.

[131] *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[132] Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[133] The Civil Rights Act of 1866 states: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States to make and enforce contracts; to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1991)).

[134] Colbert, *supra* note 22, at 404.

[135] 42 U.S.C. §§ 1981–1982 (2016).

[136] Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (1870) (codified as amended at 42 U.S.C. § 1981 (1991)).

[137] *Id.*

opposition of the "security of the person;" our society denies Black women the basic right of having security in their bodies and the expectation of safety.[138] The plain language of the 1866 Civil Rights Act and 42 U.S.C. § 1981 includes this concept of personal security. Further, personal security is an extension of Congressional intent, especially in light of the Congressional debates focused on the dangers to Black citizens.[139] As such, it follows that Congress intended for the Civil Rights Act to cover the continued abuses of Black women.[140]

C. Early Supreme Court Decisions

Early Supreme Court decisions following the passage of the Thirteenth Amendment initially limited its appeal and departed from the original intent of the legislature.[141] Regardless of the Congressional intent for the Amendment,[142] the Supreme Court in the mid to late 1800s did not view the Thirteenth Amendment as a sweeping tool for remedying the issues surrounding slavery.[143] The limiting opinions in the *Civil Rights Cases* and *Plessy v. Ferguson* paint the picture of a Court not yet willing to act as progressively as the legislature by creating narrow interpretations of the scope of the Thirteenth Amendment.[144]

The *Civil Rights Cases* signified a general acceptance of the theoretical power of the Thirteenth Amendment while simultaneously limiting its scope.[145] The majority opinion provided that under the Thirteenth Amendment, Congress was empowered to pass laws "necessary and proper . . . for the obliteration and prevention of slavery with all its badges and incidents."[146] Although on its face, this language seems beneficial for a Thirteenth Amendment argument, the Court drew a narrow interpretation of what truly constituted a badge or incident of slavery.[147] For example, the Court would not allow Congress to punish segregated

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[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1338 (2009).

[142] *See* Carter, *supra* note 30, at 48 (noting that "both sides" agreed the "goal of the Amendment was not limited to the abolition of slavery as an economic institution").

[143] Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537, 537-538 (1896).

[144] *Civil Rights Cases*, 109 U.S. at 3; *Plessy*, 163 U.S. at 537-538.

[145] Carter, *supra* note 29, at 52–53.

[146] *Civil Rights Cases*, 109 U.S. at 21; Carter, *supra* note 30. at 52; Tsesis, *supra* note 141, at 1341.

[147] Carter, *supra* note 30, at 52.

private businesses.[148] However, in light of Congress' intended application of the Thirteenth Amendment, it follows that the segregation of businesses qualifies as a badge and incident of slavery.[149] Unfortunately, because the Court chose to limit its scope, the *Civil Rights Cases* created a judicial limit on how Congress could expect to utilize the Thirteenth Amendment.[150] Justice John Marshall Harlan wrote a powerful dissent in the *Civil Rights Cases*, arguing that Congress should in fact pass laws against "deprivation, because of their race, of any civil rights granted to other freemen in the same State."[151] His position recalled the Congressional debates on the Amendment arguing that the majority was taking a needlessly restrictive view of the Thirteenth Amendment.[152] To Justice Harlan, the context surrounding the particular issue bears tremendous weight.[153]

The *Civil Rights Cases* exemplify a missed opportunity of the Court to prioritize the safety and well-being of Black people. Nonetheless, language in the case, particularly the use of the phrases "necessary and proper" and "badges and incidents of slavery,"[154] continues to add validity to Thirteenth Amendment arguments. Luckily, the Court's oppressively limited understanding of what constituted a "badge" of slavery no longer controls in modern jurisprudence.[155] Still, the limited interpretation may have had an adverse impact on the capacity of lawyers at the time to make compelling Thirteenth Amendment arguments.[156] Narrow interpretations of the Amendment's scope may have dissuaded lawyers across the country from pursuing Thirteenth Amendment arguments due to fears that they would be dismissed by courts.[157] Over time, this restrictive theory of the Thirteenth Amendment's power and usefulness inhibited the Amendment's capacity to resolve many of the issues that pervaded society following slavery.[158] Further, the avoidance of the Amendment as a viable argument continues to occlude the minds of

[148] Tsesis, *supra* note 141, at 1341 (citing *Civil Rights Cases*, 109 U.S. at 24).
[149] *Civil Rights Cases*, 109 U.S. at 20.
[150] *Id.* at 22; Carter, *supra* note 30, at 59; Tsesis, *supra* note 141, at 1338.
[151] *Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting).
[152] *Id.*; Tsesis, *supra* note 141, at 1339.
[153] *Civil Rights Cases*, 109 U.S. at 35.
[154] *Id.* at 20.
[155] *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (expanding the scope of the Thirteenth Amendment's application).
[156] *See generally* Civil Rights Cases, 109 U.S. 3 (1883) (majority) (limiting the potential use of the Thirteenth Amendment and potentially pushing lawyers to seek other arguments).
[157] *See id.*
[158] *See id.*

legal students and scholars, decreasing the likelihood of its implementation to fix the many problems it was indeed designed to fix.[159]

In *Plessy v. Ferguson*, the Court again took an unnecessarily limited stance on what it considered "badges and incidents" of slavery.[160] In *Plessy*, decided in 1896, a man of 1/8 African and 7/8 Caucasian descent rode on a rail car intended for White people only and refused to move when a train conductor tried to relocate him to a coach intended for Black people.[161] The issue in *Plessy v. Ferguson* was whether a statute requiring separate but equal railway cars in Louisiana violated the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[162] The Court held that segregation on railcars was not an issue that Congress had a right to address through the Thirteenth Amendment and that the Amendment was only intended to abolish slavery and not cover the general issues surrounding slavery.[163]

The theory of the Thirteenth Amendment underlying the Court's decision had not changed much since the *Civil Rights Cases* were decided.[164] Again, the Court restricted the concept of the Thirteenth Amendment to simply constitute an abolition of slavery, rather than the broad scope interpretation of the Amendment.[165] The *Plessy* Court rejected outright the premise that legislation had the power to resolve social problems between the races.[166] According to the majority opinion, "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[167] The Supreme Court refused to intervene in the relationship between the races and instead felt ongoing issues between them should be resolved through mutual development and understanding.[168]

[159] Colbert, *supra* note 23, at 411.
[160] Tsesis, *supra* note 141, at 1342.
[161] Plessy v. Ferguson, 163 U.S. 537, 541–42 (1896).
[162] *Id.* at 542.
[163] *Id.*
[164] *Id.* (citing Civil Rights Cases, 109 U.S. 3, 24 (1883)).
[165] *Id.*; *Civil Rights Cases*, 109 U.S. at 3–4.
[166] *Plessy*, 163 at 551.
[167] *Id.*
[168] *Id.* at 551–52.

This is a fundamentally unsound proposition.[169] The Court chose to avoid an issue that had already been confronted by the legislature.[170] The Court was not charged with creating a statutory solution but simply interpreting the scope of the Thirteenth Amendment as ratified by the 34th Congress.[171] The *Plessy* Court needed only to heed to Constitutional rule before it. The limited scope theory from the *Civil Rights Cases* survived unchanged in *Plessy v. Ferguson*.[172] This unfortunately compounded the limited interpretation and may have dissuaded the public from utilizing the Thirteenth Amendment to address broad problems.

Although the limited scope theory of the Thirteenth Amendment survived the *Civil Rights Cases* and *Plessy*, it was fortunately overturned in the critical modern case *Jones v. Alfred H. Mayer, Co.* in 1968.[173] *Jones* revived the Thirteenth Amendment's application in modern times, offering it as a viable tool to resolve the issue of the underprosecution of crimes against Black women.[174]

D. Revitalization of the Thirteenth Amendment Argument

Jones v. Alfred H. Mayer, Co. reinvigorated the Thirteenth Amendment in the modern era.[175] Joseph Lee Jones, the Petitioner in the case before the Supreme Court, alleged that Alfred H. Mayer, Co. had denied him a home in one of its communities, Paddock Woods in Missouri.[176] The Court addressed the constitutionality of 42 U.S.C. § 1982 and whether it could be applied to a situation where a private individual refused to sell a home to a Black citizen solely due to his race.[177] 42 U.S.C. § 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by White citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[178] Here, the Court primarily focused on property rights rather than the security of the person.[179] Nonetheless, § 1982

[169] *Contra id.*
[170] *Contra id.*
[171] *Contra id.*
[172] *Plessy*, 163 U.S. at 551–52.
[173] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
[174] *Id.*
[175] Colbert, *supra* note 22, at 405.
[176] *Jones*, 392 U.S. at 412.
[177] *Id.* at 412–13.
[178] *Id.* § 1982 is the current codification of the Civil Rights Act of 1866 in modern applicable law. *See* 42 U.S.C. § 1982 (2016).
[179] *Jones*, 392 U.S. at 421.

enshrines a portion of the 1866 Civil Rights Act and therefore it can be viewed as an interpretation with similar foundational footing.[180] In determining whether a White man who refused to sell a home to a Black man violated the statute, the Court first examined statute's scope.[181] The Court reasoned that § 1982 had previously been interpreted in *Hurd v. Hodge*[182] as having a broad scope and was not limited to simply allowing Black people to own property.[183] Instead, the statute extended to situations in which individuals were unduly restricted from owning particular property.[184] As such, the Court held that the statute applied to the situation Jones faced.[185]

Opponents of a broad interpretation of the Thirteenth Amendment may make the case that the plain language of the Thirteenth Amendment indicates it was only intended to end slavery in the United States.[186] However, that interpretation clearly neglects to consider the drafters' intent.[187] Further, *Jones* makes a strong case against this interpretation of the language of the Thirteenth Amendment.[188] In *Jones*, Justice Potter Stewart states that if the Thirteenth Amendment were solely intended to require the states to abolish slavery, then § 2 of the Amendment, which reads, "Congress shall have power to enforce this article by appropriate legislation," would be illogical and unnecessary.[189] According to Justice Stewart, there would be no need for that section as § 1 of the Amendment sufficiently abolished slavery.[190] Therefore, Congress must have intended for additional legislation to be passed as necessary to resolve the issues surrounding slavery.[191]

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[180] *Id.* at 422.

[181] *Id.* at 417.

[182] 334 U.S. 24 (1948).

[183] *Jones*, 392 U.S. 418–19 ("[T]he enforcement of those [restrictive] covenants would nonetheless have denied the Negro purchasers the same right as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. That result, this Court concluded, was prohibited by § 1982. To suggest otherwise . . . is to reject the plain meaning of language.") (quoting Hurd v. Hodge, 334 U.S. 24, 34 (1948)) (internal punctuation omitted).

[184] *Id.* at 419.

[185] *Id.* at 413.

[186] *See* Civil Rights Cases, 109 U.S. 3 (1883) (offering some indication of a broad Thirteenth Amendment while simultaneously limiting its scope).

[187] *Jones*, 392 U.S. at 423–25.

[188] *Id.*

[189] *Id.*; U.S. CONST. amend. XIII, § 2.

[190] *Jones*, 392 U.S. at 422–25; U.S. CONST. amend. XIII, § 1.

[191] U.S. CONST. amend. XIII, § 2.

The theory underlying the Thirteenth Amendment shifted with *Jones* back toward Congressional intent for a broad Amendment, creating an opportunity for an argument advocating for the rights of Black women without judicial restriction.[192] *Jones* provides an opportunity to finally address the sexual violence perpetrated on Black women.[193] Black women are targeted for sexual assaults and are not receiving constitutionally guaranteed support in the criminal justice system. Under the Thirteenth Amendment, one might argue that the modern treatment of Black women results from the injustices forced upon them since slavery and push for legislative action aimed at remedying this unfair treatment.[194]

IV. REMEDIES

Although the situation facing American society regarding the disparate treatment in sexual assaults of Black women is immense, a few remedies exist. The Thirteenth Amendment and U.S.C. § 1981, along with additional laws that should be passed under § 2 of the Thirteenth Amendment provide an opportunity for Congress to embed protections in legislation.[195] Black women can also use civil tort remedies to seek out some restitution for these attacks.[196] These options establish a plan to address the violence against Black women and rectify a painful aspect of their historical oppression and devaluation. Nothing can erase history and experience, but these options may provide some relief.

A. Legislation

With the Thirteenth Amendment and the current codification of the 1866 Civil Rights Act within 42 U.S.C. § 1981, some protections for Black women already exist in legislation.[197] These doctrines, already enshrined in our current law, allow a sufficient means of pursuing a claim based on the immoral under-enforcement of rape of Black women.[198] Women who have been attacked and who have not had the crimes against them adequately investigated should file suit against the government asserting that this unfair treatment is in violation of the

[192] *Jones*, 392 U.S. at 413.
[193] *See id.* (utilizing the Thirteenth Amendment may allow for its application in other cases).
[194] U.S. CONST. amend. XIII, § 2.
[195] *Id.*; *see* 42 U.S.C. §§ 1981–1982.
[196] *See infra* Part IV-B.
[197] U.S. CONST. amend. XIII; 42 U.S.C. §§ 1981–1982.
[198] U.S. CONST. amend. XIII; 42 U.S.C. §§ 1981–1982.

Thirteenth Amendment, or alternatively, in violation of 42 U.S.C. § 1981, created under the powers granted by the Thirteenth Amendment.[199]

In a Thirteenth Amendment argument, outlining the historical connection of sexual violence against Black women to slavery incorporates the background needed for a cohesive front in the mold of *Jones.*[200] The alternative, or perhaps supplemental, statutory argument for a violation of the rights included in 42 U.S.C. § 1981 should focus on the section covering "security of the person," making the point that Black women have fundamentally been denied access to safety and autonomy because of the high incidence of sexual violence.[201] These arguments grant a method of restitution for the plight Black women face regarding these crimes.[202] By introducing legal arguments grounded in the Thirteenth Amendment, attorneys, judges, and legislators will realize the potential for the Amendment to resolve vestiges of slavery. Through persistent application, the Thirteenth Amendment argument can change the minds of those who currently feel its sole purpose was to abolish slavery.[203]

With the confirmations of Supreme Court Justices Neil Gorsuch[204] and Brett M. Kavanaugh,[205] our nation's highest court may not have the political ideology that would favor a broad interpretation of the Thirteenth Amendment. Nonetheless, an alternative option remains. Congress has the power to pass laws under § 2 of the Thirteenth Amendment[206] and should exercise that power by passing legislation that specifically targets the problem that Black women face. In so doing, Congress would not only establish concrete protection for Black women in the form of a statute addressing the under-enforcement of these crimes,[207] it would also send a message to Black women that this is an

[199] U.S. CONST. amend. XIII; 42 U.S.C. § 1981.

[200] U.S. CONST. amend. XIII; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[201] *Jones*, 392 U.S. at 422–24.

[202] *Id.*; *see also* Colbert, *supra* note 23, at 405.

[203] Colbert, *supra* note 23, at 405.

[204] Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html.

[205] Seung Min Kim & John Wagner, *Kavanaugh Sworn in as Supreme Court Justice After Divided Senate Votes for Confirmation*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html.

[206] U.S. CONST. amend. XIII, § 2.

[207] *Id.*

issue that our government takes seriously enough to warrant unique legislation. This message may increase the confidence Black women have in our criminal justice system,[208] leading to increased reporting and improved statistics. Congressional action has a better chance of succeeding than cases tried in front of the Supreme Court regarding unequal treatment, especially given the fact that the 2018 mid-term elections resulted in Democratic capture of the House of Representatives.[209] Further, there has been an increased focus on male sexual violence against women since President Trump's election.[210] If activists are able to capitalize on this political moment, legislation designed to provide Black women with additional protections could succeed in Congress. Solidifying legislative support in Congress for the fair treatment of sexual assault cases of Black women would prove more fruitful than trying to push cases up to the Supreme Court.[211]

B. Civil Tort Remedies

Black women can use civil tort actions to deter sexual violence while simultaneously providing themselves with a viable means of redress. Black women could sue perpetrators of sexual assault for traditional torts like assault, battery, intentional infliction of emotional distress, and potentially false imprisonment. While no particular legal remedy can make a sexual assault survivor whole after their experience, civil tort actions can provide a victim with a more viable option than the current criminal system.[212]

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[208] *See* Taslitz, *supra* note 30, at 1190 (noting that 65.8% of blacks had "little confidence" that police treat blacks and whites equally).

[209] Philip Rucker et al., *Midterm Election: Democrats Capture House as GOP Holds Senate*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/politics/midterm-elections-democrats-flip-house-as-gop-expands-senate-majority/2018/11/07/94d62430-e27d-11e8-8f5f-a55347f48762_story.html?utm_term=.cdfc6d776d9e; *see generally* Don Hopkins, *The Party That Loses This Year Could Still Win a Big Consolation Prize*, FIVETHIRTYEIGHT (Oct. 12, 2016), https://fivethirtyeight.com/features/the-party-that-loses-this-year-could-still-win-a-big-consolation-prize/.

[210] Jessica Bennett, *The #MeToo Moment: When the Blinders Come Off*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html.

[211] Hopkins, *supra* note 209.

[212] *See* Leigh Goodmark, *"Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 718 (2015) ("People subjected to abuse cannot expect to have their experiences validated by the criminal justice system.") (discussing the problems with a criminal justice model in the context of intimate partner abuse).

The criminal system presents several problems to victims who are interested in their own individual view of justice.[213] The civil system also would allow sexual assault survivors more control over their cases, whereas the criminal system can sometimes force victims to testify against their will in the context of crimes committed against the state.[214] Sexual assault survivors do not necessarily wish to go through the traditional criminal system, which many view as not representative of their own interests.[215] The civil system presents a more individualistic response,[216] wherein victims can choose whether to move forward in filing a complaint as well as the direction that their case should take.

A potential problem with the civil system alternative is that not all perpetrators can pay the damages awarded to the victim, which can limit the potential appeal for a civil attorney to take a sexual assault case. In order for this option to be viable, lawyers would need to act in part as an activist, individually devoted to enacting social change through cases that may or may not lead to large awards for damages. In the past, lawyers who have been interested in enacting new rape laws and developing new codes have not necessarily translated into a cohesive "public interest bar" on sexual assault issues.[217] Attorneys that work on these civil cases should be interested in how they can create social change while simultaneously helping the individual survivor recover from the trauma of assault.

CONCLUSION

Black women suffer from sexual violence at a higher rate than White women[218] because of centuries-old racist biases stemming from the institution of slavery, and the United States continues to ignore their struggle. The 34th Congress anticipated the numerous injustices that would outlast emancipation and passed the Thirteenth Amendment

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[213] *See generally id.* at 731–53 (presenting the non-criminal model of community justice forums as an alternative to traditional criminal justice systems).

[214] *Id.* at 715–18.

[215] *See* SARAH DEER ET AL., FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 6 (Tribal L. and Pol'y Inst. 2007) (indicating that Indians have low trust in state criminal justice systems from a 2007 focus group).

[216] *See* Goodmark, *supra* note 212, at 727 ("Confining people subjected to abuse to one vision of justice is disempowering.").

[217] ROSE CORRIGAN, UP AGAINST THE WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 26 (NYU Press, 2013).

[218] PLANTY ET AL., *supra* note 88; CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 2 (2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf.

and the 1866 Civil Rights Act with the intention of empowering Congress to enact further legislation to protect Black people.[219] The disparate treatment of Black women subjected to sexual violence remains unresolved generations after abolition[220] and requires direct action. Utilizing the Thirteenth Amendment to its true post-Jones potential[221] would force the criminal justice system to make the necessary changes to provide Black women with the security they have long been promised.

[219] U.S. CONST. amend. XIII; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968); Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (1870) (codified as amended at 42 U.S.C. § 1981 (1991)).

[220] PLANTY ET AL., *supra* note 88; CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 2 (2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf.

[221] Colbert, *supra* note 23, at 404–05.