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Operating within Systems of Oppression

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Operating within Systems of Oppression

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I. INTRODUCTION

Before I begin my analysis into systems of oppression, I must acknowledge the sacrificial blood, sweat, and tears of the generations of women before me. I will be reflecting on my experiences and responsibilities as a white cis¹ woman, while highlighting works by Black feminists, Critical Race Theorists, and scholars focused on race, gender, and sexuality. Instead of celebrating my self-awareness, I choose to uplift the perfectly strung together words of those I have learned from in order to decenter myself. So, although I will be drawing from my personal experiences, it is important to acknowledge that feminism is too often centered around and for the benefit of white women. Mikki Kendall writes, that “white feminism tends to forget that a movement that claims to be for all women has to engage with the obstacles women who are not white face.”² With that, I will be focusing primarily on how our society founded on white heteronormative male supremacy marginalizes and erases Black women.

From the women’s suffragist movement to the nomination of Donald Trump, white women repeatedly choose the benefits of whiteness over solidarity with Black women, Indigenous women, and women of color. “The suffragist *heroes* Elizabeth Cady Stanton and Susan B. Anthony seized control of the feminist narrative of the 19th century” rendering “nearly invisible the [B]lack women who labored in the suffragist vineyard.”³ White “suffragists found themselves on opposing ends of the equal-rights battle when Congress passed the 15th Amendment, enabling [B]lack men to vote (at least, in theory) – and not women.”⁴ Recent data shows us that 46% of white women voted for Donald Trump in the 2020 Presidential election, despite the harms he enacted on women, compared to 5% of Black women, 27% of Asian women, and 30% of Latinx/Hispanic women.⁵ No matter how many years pass, white women will always have a relationship with white supremacy,

¹ Cisgender, or ‘cis’ is when a person’s gender identity corresponds with their assigned biological sex. *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Mar. 17, 2020).

² MIKKI KENDALL, HOOD FEMINISM 2 (2020).

³ Brent Staples, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/suffrage-movement-racism-black-women.html>. (emphasis added).

⁴ Monee Fields-White, *The Root: How Racism Tainted Women’s Suffrage*, NPR (Mar. 25, 2011, 8:54 AM), <https://www.npr.org/2011/03/25/134849480/the-root-how-racism-tainted-womens-suffrage>.

⁵ 2020 CES Presidential vote preferences (likely voters), COOPERATIVE ELECTION STUDY (Jan. 15, 2021), available at <https://bfschaffner.shinyapps.io/CES2020>.

one that we can subscribe to and reproduce, or actively reject.⁶ Although many of the readings I draw from are decades old, the years that pass do not deplete the message; systems of oppression have both stayed the same and transformed.

In this note I will explore the concept of progress, what it is that we are moving towards, or if we are even moving forward at all. Every time we break the ceiling, is another one built? Or are these barriers already in place waiting to be broken to disillusion us into believing the sky is ever in reach? In my analysis I will first examine the property rights of whiteness and male supremacy, whether these rights are achievable, if we even want them, and if not, are there alternatives? Then I will address how we navigate systems of oppression and how those oppressive systems capitalize off of trauma. When we work within the system, are we lending legitimacy to the oppressor?⁷ If so, does working outside of the system place us exactly where they want us? I reflect on these questions not in search of one direct answer, but to recognize my relationship with white supremacy as a white cis hetero woman, and to understand how to navigate systems of oppression that I continuously benefit from and contribute to.

II. DEFINITIONS AND ORIGINS OF TERMINOLOGY

Academic writing is often excessive and inaccessible to the general public. Many scholars believe “academics have a responsibility to make their work relevant for the society they exist within.”⁸ The words we use and the intentions behind those words are impactful and thus important to point out. For example, throughout this piece I will be using the term ‘Latinx,’ but I purposely choose to use the term ‘women’ over ‘womxn’ and ‘history’ instead of ‘hxstory.’ Using the letter X to modify words can help expand the gender binary to provide a decolonized, gender neutral identity and expression.⁹ However, the term ‘womxn’ can bring with it controversy and possible exclusion. The term ‘womyn,’ popularized in the 1970s as a “man-free spelling,” declined in the 2000s as it became associated with transgender

⁶ Because white women benefit from white supremacy, we will always be tied to it. We cannot remove ourselves from the benefits our skin affords us; therefore, we will always have a relationship with white supremacy.

⁷ This question was posed in a U.C. Hastings class while going over my note topic and how to develop it. See T. Anansi Wilson, JD, Race, Sexuality and the Law (Fall 2020), U.C. Hastings, College of the Law.

⁸ Nathan Jurgenson, *Making Our Ideas More Accessible*, INSIDE HIGHER ED (May 11, 2012), <https://www.insidehighered.com/advice/2012/05/11/scholars-must-make-their-work-more-available-and-accessible-essay>.

⁹ Rory Gory, *How the Letter “X” Creates More Gender-Neutral Language*, DICTIONARY, <https://www.dictionary.com/e/letter-x-gender-neutral-language>.

exclusion.¹⁰ In response, “[w]omxn’ emerged as a term to explicitly signpost the inclusion of trans [women] and WOC [women of color;]” however, Prishita Maheshwari-Aplin, LGBTIQ+ community organizer and Trustee of direct action group Voices4London argues that using “‘womxn’ to explicitly refer to trans [women] and WOC is more divisive than inclusive, as these groups should already be included within the terms of ‘woman/women.’”¹¹ ‘Womxn’ is also often used to inappropriately refer to non-binary people which results in an erasure of their identity by placing people “under an umbrella they did not consent to.”¹² By using ‘women’ over ‘womxn’ I am being mindful of my words and focusing on “people’s diverse identities without assuming they’re comfortable with being labelled a certain way.”¹³ Additionally, many writers, myself included, generally use ‘hxstory’ instead of ‘history,’ as a form of resistance to patriarchal society. However, for the purposes of this note, I will be using ‘history’ instead, as I am mainly referring to a history of oppression and violence, played out to maintain systems of white male supremacy. The words that we use carry deep implications. The words I choose to use in this note are not to reject or dictate what words others use but are an attempt to honor those who I have learned from.

Throughout this note I will try my best to provide clear and accessible explanations for the terms used. When quoting authors, identifiers are taken directly from their sources, so they may not match my preference or provide consistency. Additionally, I will reference multiple scholars, some who coined the terms that are now widely used. It is important that I do not dilute the meaning of their words, but properly expand on them in a way that brings justice to the origin and creators, while also providing further understanding.

III. MODERN EXECUTION AND DISCRIMINATION

Before getting into how property interests and white supremacy are entangled in our legal system and institutions, I’d like to begin with the original oppressive text itself, the Constitution. My focus is on the 13th Amendment, which did not abolish slavery, but just expanded the ways in which dominant society can further criminalize, exploit, and murder Black people.¹⁴ The 13th Amendment secures the abolition of slavery, yet includes

¹⁰ Gory, *supra* note 9.

¹¹ Monica Karpinski, *What You Need to Know About the Intersectional Term ‘Womxn,’* YOURDAYE (Aug. 19, 2020), <https://yourdaye.com/vitals/cultural-musings/what-is-the-meaning-of-womxn> (quoting Prishita Maheshwari-Aplin).

¹² *Id.*

¹³ *Id.*

¹⁴ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

the clause “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.”¹⁵ By including this clause, the 1865 ratification of the 13th Amendment created a new form of legal and accepted slavery in the form of mass incarceration.¹⁶ After the civil war “state legislatures of the South passed more and more restrictive measures which were effectively created to criminalize Black life.”¹⁷ For example it was a crime in the South for a farm worker to walk along the side of a railroad, or to speak loudly in front of white women.¹⁸ None of the laws exclusively said they applied only to Black people, “but overwhelmingly they were only ever enforced against African Americans because the explicit intent ... the discussions around the drafting of these laws were very open about the intention to make it impossible for Black men to participate in mainstream American life.”¹⁹ Most damaging were the vagrancy statutes, where in every Southern state “it became a crime if you could not prove that you were employed.”²⁰ The intent behind vagrancy statutes was to intimidate and force Black people to return to a “state of de facto slavery.”²¹ Because of similar laws, more Black men are in prison or jail, and on probation or parole than were enslaved in 1850, before the Civil War began.²²

The transition from slavery to mass incarceration reveals how white America takes inhumane and oppressive practices and makes them polished and brand new. Although not explicitly in the Constitution, the death penalty has been engrained in America since its conception.²³ Like the rest of our justice system, “the death penalty is plagued with racial disparities.”²⁴ Across the country “Black people make up 13 percent of the population, but they make up 42 percent of death row and 35 percent of those executed.”²⁵ Federal Regulations enacted in 1993, provide that executions be carried out through lethal injection.²⁶ The United States government adopted the use of

¹⁵ U.S. CONST. amend. XIII (emphasis added).

¹⁶ ALEXANDER, *supra* note 14.

¹⁷ Douglas A. Blackmon, *Laws to Criminalize Black Life?*, PBS.ORG (Feb. 12, 2012), <https://www.pbs.org/video/slavery-another-name-laws-criminalize-black-life/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² ALEXANDER, *supra* note 14, at 180.

²³ See generally Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 360 (1999).

²⁴ NAACP *Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), <https://www.naacp.org/latest/naacp-death-penalty-fact-sheet>.

²⁵ *Id.*

²⁶ 28 C.F.R. § 26.3 (1993).

lethal injection as a cheaper and more *humane* form of execution.²⁷ Yet there is nothing humane about killing someone; by medicalizing death, the lethal injection simply becomes more palatable. Lethal injection is “an attempt to cover the procedure with a patina of respectability and compassion that is associated with the practice of medicine.”²⁸

Similar to America’s progression from the medieval methods of hanging to now lethal injection, discrimination has just transformed into something more digestible for those who benefit from it.²⁹ Perhaps the violence that white America enacts to further marginalize communities is worse in modern day than it was in the 17th and 18th centuries. The Trump Administration ripped 666 migrant children away from their now lost parents, a stark display of modern-day kidnapping and enslavement.³⁰ The lynching and assault of Black and brown communities may sit on the higher end of the continuum of violence that is seen as less socially acceptable, yet because this violence is overwhelmingly government sanctioned, here we are.³¹ And what are we to say about the harm that sits on the base line? Colorblindness,³²

²⁷ Deborah W. Denno, *Lethal Injection*, BRITANNICA (Dec. 8, 2006), <https://www.britannica.com/topic/lethal-injection>.

²⁸ I. Glenn Cohen, *Executions, Doctors, the U.S. Supreme Court, and the Breath of Kings*, HEALTH AFFAIRS (Mar. 26, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150326.045714/full/> (quoting Robert D. Truog, I. Glenn Cohen & Mark A. Rockoff, *Physicians, Medical Ethics, and Execution by Lethal Injection*, 311 JAMA 2375 (2014)).

²⁹ It cannot be ignored that in August 2020 the Justice Department under Donald Trump, expanded federal execution methods to include firing squads and electrocution. If this country turned to lethal injections as a way to provide comfort to American citizens who support the death penalty, then what is the purpose of the Justice Department reverting to such vicious practices? What can be said about the state of our country when roughly 74 million Americans voted for a president who runs towards such outdated and cruel practices? On January 13th, 2021 “the Trump Administration carried out its 13th federal execution (of Dustin Higgs, age 48) since July of 2020.” The Trump Administration’s execution spree resumed federal executions after a 17-year hiatus. “No president in more than 120 years had overseen as many federal executions.” See Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, AP NEWS (Jan. 15, 2021), <https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50>; 85 Fed. Reg. 47324 (Aug. 5, 2020).

³⁰ Jacob Soboroff & Julia Ainsley, *Lawyers Can’t Find the Parents of 666 Migrant Kids, a Higher Number than Previously Reported*, NBC NEWS (Nov. 9, 2020), <https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144>.

³¹ See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race—Ethnicity, and Sex*, PROC. OF THE NAT’L ACAD. OF SCI. 16793, 16793–98 (2019); Tatiana Piper & Jackie Strohm, *Racial and Sexual Violence Pyramid*, PCAR (2019).

³² Colorblind is the concept of not seeing race, but discourse around colorblindness brings fears that “the refusal to take public note of race actually allows people to ignore manifestations of persistent discrimination. In order to tackle obscure forms of racial inequity

microaggressions,³³ and social exclusion, are all of the subtle yet inherently violent structures that lay at the foundation of modernized oppression.

Kenji Yoshino describes “The New Discrimination” as a subtler form of discrimination, where courts have upheld the discriminatory practice of covering and forced assimilation.³⁴ Covering is a “strategy that people use to downplay a stigmatized part of their identity in order to minimize the potential negative effects of bias.”³⁵ Yoshino, an openly gay Japanese American legal scholar, expresses his own experience with covering as a way of downplaying “outsider identities to blend into the mainstream.”³⁶ What bothered Yoshino when he began teaching at Yale Law School in 1998, was the “felt need to mute [his] passion for gay subjects, people, [and] culture.”³⁷ Assimilation is the “rejection or abdication of one’s primary cultural practices and adoption of another.”³⁸ A flagrant example of forced assimilation is when “the U.S. government forced tens of thousands of Native American children to attend ‘assimilation’ boarding schools in the late 19th century.”³⁹ These boarding schools were “part of a long history of U.S. attempts to either kill, remove, or assimilate Native Americans” by kidnapping children and forbidding them from “using their own languages

we must be conscious of racial differences. Colorblindness as an ideology “legitimizes specific practices that maintain racial inequalities – police brutality, housing discrimination, voter disenfranchisement, and others. Adia Harvey Wingfield, *Color-Blindness Is Counterproductive*, THE ATLANTIC (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037>.

³³ “Microaggressions are defined as the everyday, subtle, intentional – and oftentimes unintentional – interactions or behaviors that communicate some sort of bias toward historically marginalized groups.” Examples of microaggressions are asking an Asian American where they are really from, or complimenting their English, presuming they were not born in America. Micro aggressions are “thinly veiled everyday instances of racism, homophobia, sexism (and more)” that often manifests in a compliment or through body language. See Andrew Limbong, *Microaggressions Are a Big Deal: How to Talk Them Out When to Walk Away*, NPR (June 9, 2020, 12:04 AM), <https://www.npr.org/2020/06/08/872371063/microaggressions-are-a-big-deal-how-to-talk-them-out-and-when-to-walk-away>.

³⁴ Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG. (Jan. 15, 2006), <https://www.nytimes.com/2006/01/15/magazine/the-pressure-to-cover.html>.

³⁵ *Covering, Assimilation, and Code-Switching: A Quick Guide*, ESKALERA BLOG (Mar. 4, 2019), <https://eskalera.com/2019/03/04/covering-assimilation-and-code-switching-a-quick-guide>.

³⁶ Yoshino, *supra* note 34.

³⁷ *Id.*

³⁸ *Covering, Assimilation, and Code-Switching*, *supra* note 35.

³⁹ Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY (Nov. 1, 2018), <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation>.

and names, as well as from practicing their religion and culture.”⁴⁰ Modern day discrimination “aims at the subset of the [targeted] group that refuses to cover, that is, to assimilate to dominant norms.”⁴¹

America is often referred to as a melting pot, where generations of immigrants melt together, abandoning their cultures to create one homogeneous America, a cohesive whole.⁴² This analogy is often used to positively describe American society, yet, as T. Anansi Wilson, JD, points out, this forced assimilation is more of a “dismembering” to fit into dominant society.⁴³ What is used as an analogy to symbolize the coming together of all identities in America is really just the melting and erasure of subordinate groups.⁴⁴

Courts will protect traits like skin color or chromosomes because such traits cannot be changed. In contrast, the courts will not protect mutable traits, because individuals can alter them to fade into the mainstream, thereby escaping discrimination. If individuals choose not to engage in that form of self-help, they must suffer the consequences.⁴⁵

Because there are no explicit rules forcing covering and assimilation within our predominately white cis hetero male institutions, civil rights law as it stands cannot protect what is seen as a choice.⁴⁶ Renee Rogers, a Black woman working for American Airlines filed a 1981 discrimination case regarding her hairstyle.⁴⁷ “American had a grooming policy that prevented employees from wearing an all-braided hairstyle” in which they tried to enforce against Rogers.⁴⁸ Rogers filed suit for racial discrimination, but “a federal district court rejected her argument.”⁴⁹ The court alleged the discrimination based on hairstyle was not on the basis of race because unlike skin color, hairstyle is a mutable characteristic.⁵⁰ The court additionally noted that Rogers only wore cornrows after being popularized by a white

⁴⁰ Little, *supra* note 39.

⁴¹ Yoshino, *supra* note 34.

⁴² *Melting Pot*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/melting%20pot> (last visited Mar. 17, 2021).

⁴³ T. Anansi Wilson, JD, *Race, Sexuality and the Law* (Fall 2020), U.C. Hastings, College of the Law.

⁴⁴ *Id.*

⁴⁵ Yoshino, *supra* note 34.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

actress.⁵¹ This case displays how our legal system perpetuates white dominant society by upholding “covering demands” and punishing those who do not choose to “fade into the mainstream” by assimilating and changing their mutable traits.⁵² Although demands to cover may not seem as facially violent as discrimination in the past, “it is anything but trivial.”⁵³ “It is the symbolic heartland of inequality – what reassures one group of its superiority to another. When dominant groups ask subordinated groups to cover, they are asking them to be small in the world, to forgo prerogatives that the dominant group has and therefore to forgo equality.”⁵⁴ When our courts uphold demands of covering and forced assimilation within our institutions “they are legitimizing second-class citizenship for the subordinate group. In doing so, they are failing to vindicate the promise of civil rights.”⁵⁵

IV. GATEKEEPING OF PROPERTY INTERESTS

A. Property Interests of Whiteness

In *Whiteness as Property*, Cheryl L. Harris “examines how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law.”⁵⁶ In telling a story about her grandmother, Harris describes “white passing” as a sense of trespassing, a “valorization of whiteness as treasured property in a society structured on racial caste” and that the risk of “self-annihilation” is often the only way to survive in a white supremacy society.⁵⁷ Passing is “when people decide to change their background and their social identifiers” in order to alter their legal and social status.⁵⁸ Most U.S. examples of passing, are people pretending to be of European descent as it “carries with it certain legal protections and benefits.”⁵⁹ The protections of being within a protected group was also acknowledged and often utilized by members of said protected group.⁶⁰ In a successful attempt to “strike outrage and fear” into the consciousness of white citizens, Abolitionist Henry Ward Beecher (a white man) would use photos of enslaved biracial white passing

⁵¹ Yoshino, *supra* note 34.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1707–91 (1993).

⁵⁷ *Id.* at 1713.

⁵⁸ Danielle Bainbridge, *What is Racial Passing?*, PBS.ORG (Feb. 27, 2019), <https://www.pbs.org/video/what-is-racial-passing-ijx09h>.

⁵⁹ Bainbridge, *supra* note 58.

⁶⁰ *Id.*

children.⁶¹ Although white passing, children of enslaved women were not given the protections of whiteness.⁶² “Anxiety around the fragility of racial legal boundaries” moved many white people to support abolishing slavery, as what is going to stop them or their children from being enslaved?⁶³

Only white people can truly possess whiteness, which creates a “highly valued and exclusive form of property.”⁶⁴ A “presumption of freedom arose from color (white) and the black color of the race (raised) the presumption of slavery,” creating whiteness as a “shield from slavery” and a “source of privilege and protection.”⁶⁵ But as explained above with the enslaved biracial children, whiteness carries with it social capital and protections which the dominant group controls.⁶⁶ This type of control of power manifest into a form of gatekeeping. Gatekeeping is the act of controlling and limiting access to something, in this case, access to whiteness.⁶⁷

B. Guarding Whiteness

Although dominant white society forces assimilation and covering, the protections of whiteness are never fully given up. “Property is nothing but the basis of expectation . . . in a society structured on racial subordination, white privilege became an expectation.”⁶⁸ The protection of these expectations becomes central because “if an object you now control is bound up in your future plans or in your anticipation of your future self . . . then your personhood depends on the realization of these expectations.”⁶⁹ This type of expectation, being accustomed to privilege, is what leads many of us (white women particularly) to betray our sisters in the fight against white male supremacy. “[S]ince its inception, mainstream feminism has been insisting that some women have to wait longer for equality, that once one

⁶¹ “The ‘one drop rule’ came out of America’s early experience with race-mixing during slavery and afterward in the Jim Crow south.” In a time where enslaved Black women would give birth to children fathered by their white slave owner, the nation questioned who constituted as Black. The answer to this question was that anyone with any known African American ancestry – was Black, and thus could and would be enslaved. This way of categorizing people stemmed from a pseudo-science put in place to protect whiteness and to maintain a caste system where Black people are second-class citizens. See Bainbridge, *supra* note 58; see also Lawrence Wright, ‘One Drop of Blood,’ THE NEW YORKER (1994), <http://www.afn.org/~dks/race/wright.html>.

⁶² Bainbridge, *supra* note 58.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Gatekeeper*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gatekeeping> (last visited Mar. 17, 2021).

⁶⁸ Harris, *supra* note 56, at 1729–30.

⁶⁹ *Id.* at 1730.

group (usually white women) achieves equality then that opens the way for all other women.”⁷⁰

White feminism exists to promote the comfort and safety of middle-class and affluent [w]hite women. At its core, it is a racist ideology that claims to speak for all women while ignoring the needs of women of color . . . only to further its own aims and appear inclusive.⁷¹

White women often push to gain access to positions of power, but “[fail] to show up when Black women are not being hired because of their names or fired for hairstyles.”⁷² Throughout history, white women, time and again, replicate the harmful social dynamics of white male supremacy, despite the outward image of a united fight against it. White feminism expects “that we treat the patriarchy as something that gives all men the same power[,]” alienating the obstacles many women face.⁷³ The superficial solidarity and white washing of feminist history leads to the further marginalization and erasure of Black women, Indigenous women, and women of color.

Because white women will always benefit from white supremacy, we will always have a property interest in upholding it, whether we want to accept that reality or not. This property interest often manifests in feminist spaces and the general social justice realm. Only listening to Black women when their tone and appearance are palatable to our narrow perception of revolution is violence, in just a more socially accepted form. Opening up space for Black women, Indigenous women, and women of color, but not creating safeguards against white supremacy is violence disguised as equality. Just the inherent ability to be the providers, the gatekeepers, is in itself a property right that white women hold and struggle to relinquish.

C. Property Interests in Male White Supremacy

Similar to this innate loyalty to white supremacy, Marilyn Frye goes into depth about how some gay men are the most loyal to masculinity and male

⁷⁰ KENDALL, *supra* note 2, at 2.

⁷¹ Monnica T. Williams, *How White Feminists Oppress Black Women: When Feminism Functions as White Supremacy*, CHACRUNA INST. (Jan. 16, 2019), <https://chacrana.net/how-white-feminists-oppress-black-women-when-feminism-functions-as-white-supremacy/> (citing Mariana Ortega, *Being Lovingly, Knowingly Ignorant: White Feminism and Women of Color*, 21 HYPATIA 56, 56–74 (2006)).

⁷² KENDALL, *supra* note 2, at 2.

⁷³ *Id.* at 3.

supremacy, even more so than their heterosexual male counterparts.⁷⁴ “The presumption of male citizenship is the principle that if, and only if, someone is male, he has a *prima facie* claim to a certain array of rights, such as the rights to ownership and disposition of property.”⁷⁵ Just like with whiteness, any challenges to masculinity and male supremacy often sparks a need for protecting rights. “If others deny a man these rights arbitrarily . . . then the implication arises that he is not really or fully a man or male.”⁷⁶ To challenge this male citizenship is to question the inherent subordination of the feminine, something foundational to male supremacy.⁷⁷ In a culture obsessed with and dominated by male supremacy, “one of the very nasty things that can happen to a man is his being treated or seen as a woman, or womanlike.”⁷⁸ Gay men are overwhelmingly subject “to being pegged at the level of sexual status, personal authority and civil rights which are presumptive for women.”⁷⁹ Although some gay men take this shared oppression to form an alliance with women, Frye argues that “the straight culture’s identification of gay men with women usually only serves to intensify gay men’s investment in their difference and distinction” from women.⁸⁰

Much like how white women cling to the rights of white supremacy, “men not uncommonly act out of contempt for women ritually to express and thereby reconfirm for themselves and each other their manhood, that is, their loyal partisanship of the male ‘us’ and their rights to the privileges of membership.”⁸¹ This contempt for women is so common and often discreet, it can be passed for humor, entertainment, the fashion industry, and not so discreetly, heterosexual pornography.⁸² By distancing themselves from women, gay men are able to preserve their place of power within male supremacy, just as white women in their erasure of Black women, Indigenous women, and women of color.⁸³ Gay men are not exempt from loyal partisanship of the male, but, as Frye explains, are central to upholding (and dismantling) masculinity and male supremacy.⁸⁴

⁷⁴ Marilyn Frye, *Lesbian Feminism and the Gay Rights Movement: Another View of Male Supremacy, Another Separatism*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 128–51 (1983).

⁷⁵ *Id.* at 131.

⁷⁶ *Id.*

⁷⁷ *See generally id.*

⁷⁸ *Id.* at 136. Here Frye refers to a “woman-hating culture” which is a label that carries much support but requires a further analysis into her reading and other works focused on male supremacy which I do not go into depth in here. *Id.*

⁷⁹ *Id.* at 137.

⁸⁰ *Id.* at 139.

⁸¹ *Id.* at 136.

⁸² Frye, *supra* note 74, at 136.

⁸³ *See supra* section IV.B discussing white feminism and “guarding whiteness.”

⁸⁴ Frye, *supra* note 74, at 145.

Heteropatriarchy is another way to protect male supremacy, through intimate hierarchy. Heteropatriarchy reinforces the sex/gender status quo created to maintain cisgender heterosexual male dominance.⁸⁵ Discrimination transcends from the intimate domain and contributes to “one form of discrimination in the employment domain.”⁸⁶ For example, “when women begin to enter the workforce in traditionally male spheres, the men try to turn them into mistresses, thus replacing them in the private sphere.”⁸⁷ This attempt to keep women out of workplaces traditionally reserved for men manifests through sexual harassment, and the sexualization of women in the workplace.⁸⁸ Normative heterogamy applies a binary lens to gender and sex — the masculine and feminine, pairing men and women in the intimate domain.⁸⁹ “But normative heterogamy does not mean being together in all ways. Rather, it typically prescribes holding women close, but keeping them in a role.”⁹⁰ Norms from the intimate domain of heterogamy skew the courts’ perception of discrimination where “[they] do not see the nonsexual forms of harassment as harassment.”⁹¹ “Normative heterogamy is assumed to be such a strong social force that courts expect that intimate pull between men and women to be ever present.”⁹² Courts thus do not protect women from discrimination and exclusion through “work-undermining strategies.”⁹³ This inability then uplifts efforts to push women out of jobs so men can reclaim the spaces they believe belong to them.⁹⁴

V. THE EXCLUSIVITY OF AN OBJECTIVE LEGAL SYSTEM FORMED THROUGH A WHITE SUPREMACIST GAZE

A. Antidiscrimination Law and its Erasure of Black Women

The court system, and the law in general, is a dominated space created to protect white male supremacy by using an objective based off of white male

⁸⁵ See generally Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflating of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN (1996).

⁸⁶ Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1337 (2009).

⁸⁷ *Id.* at 1336.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1337.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

experience.⁹⁵ Leading scholar of Critical Race Theory and creator of the theory of intersectionality,⁹⁶ Kimberlé Crenshaw states that “[o]bjectivity” is itself an example of the reification of white male thought.”⁹⁷ Excluding subjective experiences from the protection of the law is how courts can base their perception on oppressive systems like normative heterogamy. It is a way to erase experiences of those who do not benefit from white male supremacy and to quite literally write people out of the law.

Viewing the law through an objective lens based off of a singular experience “sets forth a problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis.”⁹⁸ Crenshaw examines “how this tendency is perpetuated by a single-axis framework that is dominant in antidiscrimination law.”⁹⁹ “A single-axis framework treats race and gender as mutually exclusive categories of experience. In so doing, such a framework implicitly privileges the perspective of the most privileged members of oppressed groups.”¹⁰⁰ This single-axis framework throughout the law places Black women in a position where they have to choose between sex or race discrimination, erasing their experiences as Black women and often dwindling their chances of any remedies.

In a case against General Motors brought by five Black women, the court stated that Black women “should not be allowed to combine statutory remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended.”¹⁰¹ It seems that

⁹⁵ See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, UNIV. OF CHI. LEGAL F. 139 (1989).

⁹⁶ Kimberlé Crenshaw coined the term intersectionality over thirty years ago, but its use has been distorted into a sort of identity politics. Crenshaw defines intersectionality as a lens to see how “various forms of inequality often operate together and exacerbate each other.” Intersectionality emerged from Crenshaw’s research surrounding the legal system’s “narrow view of discrimination” in regard to the combination of race and gender. Intersectionality calls on us to not just address one form of oppression but to examine other forms of contributory oppression. See Jane Coaston, *The Intersectionality Wars*, VOX, (May 28, 2019), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>; see also Kate Steinmetz, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today*, TIME (Feb. 20, 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality/>.

⁹⁷ Crenshaw, *supra* note 95, at 154 (quoting GLORIA T. HULL ET AL., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE XXV (1982)).

⁹⁸ Crenshaw, *supra* note 95, at 139.

⁹⁹ *Id.*

¹⁰⁰ Amy Allen, *Feminist Perspectives on Power*, STANFORD ENCYCLOPEDIA OF PHIL. (2016).

¹⁰¹ Crenshaw, *supra* note 10495, at 141 (quoting *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 143 (E.D. Mo. 1976)).

by the court believing the combination of discrimination would yield a “super-remedy,” they also acknowledge the discrimination Black women face is in itself beyond just the singular sex or race discrimination, yet they refuse to offer the appropriate relief acknowledging this intersection of oppression.¹⁰²

The court’s refusal in *DeGraffenreid* to acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women’s and Black men’s experiences. Under this view, Black women are protected only to the extent that their experiences coincide with those of either of the two groups.¹⁰³

This singular view creates a standard to provide protections for Black men and for white women, while making it extremely difficult if not impossible for Black women to receive protection.¹⁰⁴ I am not sure what a proportionate form of relief would be for those who experience discrimination and violence based off of their intersecting identities. I do however know that until our courts step away from this singular view of discrimination, Black women will continue to be abused and erased by our legal system. The responsibility to step away from this singular view is not only placed on the courts but also on all of us participating inside and outside of the legal system. As lawyers, organizers, and resource providers, we have to understand issues of discrimination and violence as a “direct result of economic inequality, colonization, and other forms of state violence.”¹⁰⁵ Discrimination does not happen in a vacuum; systems of inequity work within a cycle of “systematic exploitation, disempowerment, and isolation.”¹⁰⁶ In order to see real change within our court system, we have to hold ourselves accountable and actively disrupt the status quo.¹⁰⁷ This means working not to fix one individual issue of discrimination, but acknowledging and chipping away at the “structural forces” that allow for this discrimination

¹⁰² Crenshaw, *supra* note 10495, at 141.

¹⁰³ *Id.* at 143.

¹⁰⁴ *See generally id.* at 142–45.

¹⁰⁵ Paul Kivel, *Social Service or Social Change*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 129, 143 (INCITE! ed., Duke Univ. Press 2017) (2007).

¹⁰⁶ *Id.* at 143.

¹⁰⁷ *Id.* at 144.

to continue.¹⁰⁸ “Even if it is not possible to change the system from within, an individual’s actions within the system do matter.”¹⁰⁹

B. The Criminalization of Black Transgender People

The courts’ failure to acknowledge combined discrimination is only exacerbated when more identities intersect. For instance, because Black transgender women exist at multiple intersections of oppression, they are “uniquely singled out for criminalization by the police and government.”¹¹⁰ “Walking while trans” is a phrase used to refer to when transgender women, “especially those of color, are profiled as sex workers by police.”¹¹¹ “A 2014 report from Columbia University found LGBTQ youth and trans women of color in particular ‘are endemically profiled as being engaged in sex work, public lewdness, or other sexual offenses.’ In these cases, law enforcement will even use the possession of condoms as evidence of prostitution-related offenses.”¹¹² Not only are Black transgender women targeted for criminalization by the police, but the same biases exist within the court system.¹¹³ In cases involving self-defense, transphobic beliefs about Black transgender people’s “purported deceitfulness and hypersexuality” paired with the “racist tropes about the inherent criminality of Black people” deny victimhood to Black transgender individuals.¹¹⁴

Common law self-defense protections derive from the “perfect victim myth” – “the pure, virginal, modest, white woman who did nothing to provoke or invite her attack, and who is thus morally blameless.”¹¹⁵ Despite Black transgender people facing disproportionate rates of violence in the United States, the narrow requirements for traditional self-defense (imminence of threat, necessity, proportionality, and reasonableness) are viewed from the perspective of a white man.¹¹⁶ The reasonableness

¹⁰⁸ Kivel, *supra* note 105, at 143.

¹⁰⁹ *Id.* at 144 (quoting TAIAlAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 76 (1999)).

¹¹⁰ *Trans Agenda for Liberation: Pillar 1, Black Trans Women and Black Trans Femmes: Leading & Living Fiercely*, TRANSGENDER LAW CTR., <https://transgenderlawcenter.org/black-trans-women-black-trans-femmes-leading-living-fiercely> (last visited Mar. 17, 2021).

¹¹¹ German Lopez, “Walking While Trans”: How Transgender Women of Color Are Profiled, VOX (July 21, 2015, 2:20 PM), <https://www.vox.com/2015/7/21/9010093/walking-while-transgender>.

¹¹² *Id.*

¹¹³ See generally Shawn E. Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, NEV. L.J. 1, 1–16 (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689118.

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.* at 15.

¹¹⁶ *Id.* at 8–9.

requirement is “inherently infected with society’s collective implicit bias” that stereotypes [marginalized individuals] as “inherently violent” calling into question their reasonably “violent self-defensive actions . . . even if otherwise necessary and lawful.”¹¹⁷

In 2011, CeCe McDonald, a Black transgender woman, was placed “on trial for surviving a hate crime.”¹¹⁸ CeCe was “sentenced to 41 months in prison for defending her friends and herself from racist, transphobic assaulters.”¹¹⁹ One night a “group of at least four white people outside [a] bar began harassing [CeCe] and her friends,” hurling racist and transphobic slurs.¹²⁰ One of the attackers hit CeCe in the face with a glass of alcohol, leading to a fight breaking out between the two groups.¹²¹ One of the attackers followed CeCe as she attempted to leave the scene; she “took a pair of scissors out of her purse and turned around to face [him]; he was stabbed in the chest and died from the wound.”¹²² Although CeCe claimed self-defense she was arrested and charged with second-degree intentional murder.¹²³ During the trial, the judge denied the submission of evidence that supported the defense’s argument that the man who died was a racist (including autopsy photos of his swastika tattoo and his criminal record).¹²⁴ The judge also denied the testimony from an expert witness “who would testify to transgender people’s experiences of violence in their everyday lives.”¹²⁵ With the threat of a forty year sentence for second-degree intentional murder, CeCe accepted a plea deal for first-degree manslaughter, sentencing her to forty-one months in a male prison.¹²⁶ CeCe’s story is just one example of Black transgender individuals being over-victimized and under-protected, in a system that both refuses to provide protections “from private violence and then punishes them for lawfully exercising their right to protect themselves.”¹²⁷

¹¹⁷ Fields, *supra* note 113, at 9–10.

¹¹⁸ Nicole Pasulka, *The Case of CeCe McDonald: Murder – or Self-Defense Against a Hate Crime*, MOTHER JONES (May 22, 2012), <https://www.motherjones.com/politics/2012/05/cece-mcdonald-transgender-hate-crime-murder/>.

¹¹⁹ Leo Cardoza, *The Prison Letters of CeCe McDonald*, ILR (July 15, 2020), <https://www.ilr.cornell.edu/post/prison-letters-cece-mcdonald>.

¹²⁰ Pasulka, *supra* note 118.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Fields, *supra* note 113, at 8.

C. Rape Law and its Roots in White Identity

Similar to how self-defense law is shaped by white identity, leading to the criminalization of Black transgender women, “theory emanating from a white context obscures the multidimensionality of Black women’s lives” within the court system.¹²⁸ Rape law reflects white male control over white women and our sexuality.¹²⁹ Historically the courts have regulated the chastity of white women with no “institutional effort to regulate” the chastity of Black women.¹³⁰ Some courts “had gone so far as to instruct juries that, unlike white women, Black women were not presumed to be chaste.”¹³¹ The singular focus on the chastity of white women places Black women outside of the law’s protection.¹³² “Because of the way the legal system viewed chastity, Black women could not be victims of forcible rape . . . [t]hus, Black women’s rape charges were automatically discounted.”¹³³ “When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically: Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection.”¹³⁴

This racial terror and “white male power was reinforced by a judicial system in which the successful conviction of a white man for raping a Black woman was virtually unthinkable.”¹³⁵ Additionally, the regulation of white women’s sexuality reinforced the lynching of Black men, which created suspicion within the Black community, surrounding the litigation of sexual violence.¹³⁶ The history of the legal system refusing to “punish, or even recognize, sexual assaults” against Black women, while severely punishing (sometimes without evidence) Black men accused of raping white women, results in reluctance amongst Black victims/survivors and community members to report sex crimes.¹³⁷ Black women again are thus “caught between ideological and political currents that combine first to create and then to bury Black women’s experiences.”¹³⁸ In order for Black women to seek justice they have to choose between two communities that do not

¹²⁸ Crenshaw, *supra* note 95, at 157.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 158.

¹³⁴ *Id.* at 158–59.

¹³⁵ *Id.* at 159.

¹³⁶ *Id.*

¹³⁷ Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NAT’L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 7 (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf.

¹³⁸ Crenshaw, *supra* note 95, at 160.

provide the protections needed to address both the racism and sexism that drives violence against Black women.

Rape shield laws, introduced in the late 20th century, display the troubling consequences that arise from rape law being rooted in white identity. Rape shield laws prevent the “defendant’s counsel [from introducing] the accuser’s sexual history as evidence during a rape trial and therefore can prevent the accuser from being discredited by information that is not relevant to the defendant’s guilt or innocence.”¹³⁹ However, rape shield laws implicitly communicate “that [jurors] should assume that the complainant is a virgin, or if not a virgin, at least notionally a good girl, and thus deserving of the law’s protection.”¹⁴⁰ Thus when feminists, and victim rights advocates push for rape shield laws they “have reinscribed the very chastity requirements they hoped to abolish.”¹⁴¹ Rape shield laws signifying the white chaste woman ideal then “conflicts with preexisting rape scripts: those assumptions we have about what rapists look like, what constitutes rape, and most importantly here, what rape victims look like.”¹⁴² Although rape shield laws can limit what the jurors are told, they do not limit what the jurors assume.¹⁴³ “The same year feminists agitated for rape shield laws, a study of rape attitudes of thirty-eight judges in Philadelphia revealed that several judges equated the category of ‘vindictive women’ with [B]lack women.”¹⁴⁴

[T]here is nothing in the history to suggest that reformers gave any consideration to how rape shield laws might or might not benefit women of color. Rather, the push for rape shield laws, and indeed rape reform in general, betrays . . . ‘white solipsism’ – that tendency to see whiteness as the norm.¹⁴⁵

Current rape shield laws reinstate “default assumptions about women who, because of race or class or some other trait, do not fit in the script of ideal rape victims.”¹⁴⁶ Professor Bennett Capers offers two modest proposals to rethink rape shield laws by altering jury instructions and addressing jurors’ implicit biases.¹⁴⁷ First, Bennett lays out a jury instruction that goes against

¹³⁹ *Rape Shield Law*, BRITANNICA (May 2, 2016), <https://www.britannica.com/topic/rape-shield-law>.

¹⁴⁰ Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 829 (2013).

¹⁴¹ *Id.* at 826.

¹⁴² *Id.*

¹⁴³ *Id.* at 868.

¹⁴⁴ *Id.* at 869.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 871.

¹⁴⁷ *Id.* at 873.

the chastity message and instead promotes respect and protections for everyone despite their sexual history.¹⁴⁸ Second, in situations where jurors reject the jury instructions and “instead rely on default [racist] assumptions about sexuality,” Bennett proposes encouraging jurors to address their implicit biases and evaluate whether they would reach the same decision if the complainant were white instead of Black.¹⁴⁹ This would be an attempt to debias the juror and prompt them to “apply the rape shield rule equally to all complainants.”¹⁵⁰ These proposals start in the courtroom and “can make a critical difference in the message jurors are left with when they deliberate.”¹⁵¹ Additionally something like a shift in jury instructions “can make a difference in the message jurors take with them when they leave the courthouse.”¹⁵²

D. The Hypervaluation of Heterosexuality and Violence within Rape Law

Inconsistent legal treatment of unwanted sexual advances “positively values male expression of heterosexuality and violence.”¹⁵³ In regard to unwanted sexual advances on women, “some scholars argue that because women rarely respond violently to unwanted sexual advances or other stimuli that incite anger or fear, the provocation defense¹⁵⁴ need not be considered in the context of women facing unwanted sexual advances.”¹⁵⁵ However,

¹⁴⁸ Jury instruction example:

I give this instruction in all cases because it applies to all rape cases. Everyone deserves to have the criminal law vindicate them when they have been raped, regardless of their sexual history. Engaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law’s protection. Everyone is entitled to sexual autonomy, and no one, by merely engaging in sex, assumes the risk of subsequent rape. Put differently, before the law, it does not matter whether a complainant is a virgin or sexually active. Before the law, everyone is entitled to legal respect, regardless of his or her sexual past. Accordingly, bear in mind that in this case and in all rape cases, all rape victims are entitled to the law’s protection.

Capers, *supra* note 140, at 872.

¹⁴⁹ *Id.* at 873.

¹⁵⁰ *Id.* at 874.

¹⁵¹ *Id.* at 872–73.

¹⁵² *Id.* at 873.

¹⁵³ Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 317 (2011).

¹⁵⁴ “In criminal law, provocation can be a defense that justifies an acquittal, mitigated sentence, or reduction of conviction to a lesser charge.” *Provocation*, CORNELL LAW SCHOOL: LEGAL INFO. INS., <https://www.law.cornell.edu/wex/provocation>.

¹⁵⁵ Ramakrishnan, *supra* note 153, at 317.

women who face unwanted sexual advances often do not receive legal protection, regardless of their response.¹⁵⁶ Focusing on street harassment and the often “debilitating” harm women endure, “women of color may suffer from street harassment more intensely due to the historical associations evoked in the moment of harassment.”¹⁵⁷ Street harassment of Black women “evokes a long history of disrespect, degradation and inhuman sexual mistreatment.”¹⁵⁸ Similarly, the history of sexual subjugation of Asian women leads to Asian women experiencing street harassment “more acutely” than their white counterparts.¹⁵⁹ Street harassment is so engrained in our everyday lives, resulting in numerous harms that “do not fit neatly within any civil or criminal causes of action.”¹⁶⁰ “Street harassment is so pervasive and normalized that it is often exceedingly difficult to prove that it constitutes exceptional, unreasonable, or outrageous behavior – the most common legal standards applied in such cases.”¹⁶¹ Some jurisdictions require the “showing of repeated acts in order to state a valid cause of action.”¹⁶² Addressing street harassment under general state harassment laws is also extremely difficult because the plaintiff must prove intent.¹⁶³ In the case *Commonwealth v. Duncan*,¹⁶⁴ the plaintiff only prevailed because the *repeated* requests of the defendant constituted harassment.¹⁶⁵ However, the dissenters in *Duncan* disagreed as they believed this type of harassment was “generally accepted behavior, leaving the actor without reasonable notice that his conduct is criminal,” and that incidents like this are so frequent that the justice system cannot handle them efficiently.¹⁶⁶ Ultimately, “these judges argued that because harassment is omnipresent, it should not be criminally prosecuted.”¹⁶⁷

Similar to the dissenter’s approach in *Duncan*, the objectivity standard for harassment in the workplace is once again based off of the objective standard of white cis hetero men.¹⁶⁸ A plaintiff must prove that the harassment experiences was “sufficient to create an objectively intimidating,

¹⁵⁶ Ramakrishnan, *supra* note 153, at 317.

¹⁵⁷ *Id.* at 320.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 321.

¹⁶¹ *Id.* at 322.

¹⁶² *Id.* at 323.

¹⁶³ *Id.*

¹⁶⁴ 363 A.2d 803 (Pa. Super. Ct. 1976). *Commonwealth v. Duncan* is a case where the defendant (a man) “repeatedly” requested to engage in cunnilingus despite the plaintiff’s objections. *Id.* at 805. See also Ramakrishnan, *supra* note 153, at 324.

¹⁶⁵ *Duncan*, 363 A.2d at 805–06; see also Ramakrishnan, *supra* note 153, at 324.

¹⁶⁶ Ramakrishnan, *supra* note 153, at 325 (citing *Duncan*, 363 A.2d at 809, n.4).

¹⁶⁷ Ramakrishnan, *supra* note 153, at 325.

¹⁶⁸ See generally *id.* at 302–24.

hostile, offensive, or abusive work environment.”¹⁶⁹ This relies on troublesome objective standards of white cis hetero men, which leaves room for racist and sexist bias. Some courts have begun “to assess hostile work environment claims using a ‘reasonable woman’ standard” or even “from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.”¹⁷⁰ However, because of societal standards that still categorize women as property, courts are able to determine that some unwanted sexual advances are “insufficiently severe.”¹⁷¹ “The difficulty that women have in obtaining redress for workplace harassment suggests that their male harassers receive impunity for their actions under the law.”¹⁷² These difficulties are magnified when the women experiencing the harassment have multiple identities that come with generations of degradation.¹⁷³

Our court system actively marginalizes Black women, placing them below others who are disadvantaged only by a singular factor.¹⁷⁴ The ceiling that we are all hoping to break through is really just the floor “above which only those who are *not* disadvantaged in any way reside.”¹⁷⁵ So those who are “multiply-burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.”¹⁷⁶ This once again comes around to the control of property interests and how those on top, white cis hetero males, generally followed by white cis hetero women, are the gatekeepers for those who, but for *one additional* disadvantage can be let in. Those of us who are the closest to the ceiling are strategically placed in the position where to gain access we often have to step on the backs of those below us in the racial and gender hierarchy.¹⁷⁷ Therefore, it is on us, those who have the unearned right to be gatekeepers, to reject the dominant paradigm. Mikki Kendall says it best in that getting real work done “means taking the risks inherent in wielding privilege to defend communities with less of it, and it means being willing to not just pass the mic but to sometimes get completely off the stage so that someone else can get the attention they need to get their work done.”¹⁷⁸

¹⁶⁹ Ramakrishnan, *supra* note 153, at 332.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 334.

¹⁷² *Id.* at 338.

¹⁷³ *See generally* Crenshaw, *supra* note 95; Ramakrishnan, *supra* note 153.

¹⁷⁴ Crenshaw, *supra* note 95, at 151.

¹⁷⁵ *Id.*

¹⁷⁶ Crenshaw, *supra* note 95, at 152.

¹⁷⁷ *See generally id.*

¹⁷⁸ KENDALL, *supra* note 2, at 255–56.

VI. INSTITUTIONAL OPPRESSION DISGUISED AS PROGRESS

Predominately white institutions, like universities and law school, provide diversity scholarships which require students to “commodify their backgrounds” in exchange for temporary access into white spaces.¹⁷⁹ This operation of white supremacist capitalism generally leads to people having to relive their trauma for money from an institution that will turn around and enact the same violence that manufactured their trauma.¹⁸⁰ Racial capitalism “fractures identity, creates pressure for nonwhite people to engage in particular identity performances, and inflicts economic harm by placing nonwhite people at the greater mercy of the market.”¹⁸¹

Racial capitalism is a problematic practice of “deriving social and economic value from the racial identity of another person.”¹⁸² “The process of racial capitalism relies upon and reinforces commodification of racial identity, thereby degrading that identity by reducing it to another thing to be bought and sold.”¹⁸³ “Assigning value to nonwhiteness within a system of racial capitalism displaces measures that would lead to meaningful social reform.”¹⁸⁴ The value does not always have to be immediately economic but can often allow institutions to “[deflect] potential charges of racism,” or avoid legal liability for racial discrimination.¹⁸⁵

Not only do institutions use racial capitalism for enrichment, so does dominant society as a whole, i.e. white people.¹⁸⁶ White people gain economic and social value associated with nonwhiteness through “affiliations with friends, colleagues, and employees.”¹⁸⁷ The value associated with nonwhiteness gives white people and white institutions the power to determine the worth of nonwhiteness, upholding our position of gatekeepers.¹⁸⁸ Racial capitalism and claiming nonwhiteness benefits institutions by providing universities, “status, honor and respect” yielding both “social and economic value.”¹⁸⁹

¹⁷⁹ Rose Courteau, *The Problem with How Higher Education Treats Diversity*, THE ATLANTIC (Oct. 28, 2016), <https://www.theatlantic.com/education/archive/2016/10/trading-identity-for-acceptance/505619/>.

¹⁸⁰ See generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

¹⁸¹ *Id.* at 2204.

¹⁸² *Id.* at 2152.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2152.

¹⁸⁵ *Id.* at 2155.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2191.

¹⁸⁸ *Id.* at 2171.

¹⁸⁹ *Id.* at 2194.

If the diversifying of predominately white institutions is driven by economic and social benefits, then how do we measure our collective progress toward lasting equity? Many employers will showcase a “few select nonwhite employees” but the “workplace cultures in which many nonwhite individuals often feel subtly unwelcome” do not change.¹⁹⁰ So, these institutions open up narrow spaces to use and tokenize people who are negatively racialized, but then do not provide any changes to the environment or work culture to protect from harmful racist practices. This then forces people who fight to gain access to these spaces to choose between their success and their mental and physical health, to be tokenized and terrorized or to remove themselves from the opportunity entirely.

Across the country, “students of color are showing that they feel disconnected from their respective schools, that implicit yet institutionalized racism creates emotional distance between them and their white peers and faculty.”¹⁹¹ “Black students continuously experience, fight against and bear emotional scars from racism, which can lead to increased anxiety and poor mental health outcomes.”¹⁹² “On February 10, 2014 a group of students from UCLA School of Law gathered together to raise awareness of the disturbing emotional toll placed upon students of color due to their alarmingly low representation within the student body.”¹⁹³ Multiple students describe a “constant burden of pressure” to represent the Black community as often the only Black person in the room.¹⁹⁴

Our academic environments often “condone microaggressions and stereotyping” leading to Black students and students of color feeling like they need to “outshine their peers . . . to disprove the notion that they are academically inferior.”¹⁹⁵ In a 2016 Supreme Court case over an affirmative-action program, Justice Scalia cited an unfounded theory known as the “mismatch theory” – a conservative critique which says marginalized students “shouldn’t get preferential treatment at colleges, because they’ll just fail.”¹⁹⁶ By including this theory during opening arguments, Scalia doubled

¹⁹⁰ Leong, *supra* note 180, at 2164.

¹⁹¹ Adrienne Green, *The Cost of Balancing Academia and Racism*, THE ATLANTIC (Jan. 21, 2016), <https://www.theatlantic.com/education/archive/2016/01/balancing-academia-racism/424887/>.

¹⁹² Greta Anderson, *The Emotional Toll of Racism*, INSIDE HIGHER ED (Oct. 23, 2020), <https://www.insidehighered.com/news/2020/10/23/racism-fuels-poor-mental-health-outcomes-black-students>.

¹⁹³ Record to Capture, 33, YOUTUBE (Feb. 10, 2014), <https://www.youtube.com/watch?v=5y3C5KBcCPI>.

¹⁹⁴ *Id.*

¹⁹⁵ Green, *supra* note 191.

¹⁹⁶ Derek Thompson, *The Myth of American Universities as Inequality-Fighters*, THE ATLANTIC (Aug. 31, 2017),

down on a racist ideology that suggests “Black students might be better off attending ‘a slower-track school where they do well’ rather than elite schools.”¹⁹⁷ “Some experts suggest that [B]lack students who strive to simultaneously excel in the classroom and disprove the mismatch theory might ultimately overwork themselves to the point of illness – all just to prove their intellectual worth.”¹⁹⁸

Our institutions may look like they are diversifying, but no amount of ‘Diversity and Inclusion’ trainings will remove the deeply imbedded forms of white supremacy that are habitually reinforced. Understanding that the institutions we take part in actively perpetuate harmful racist norms (like the stereotyping explained above), is just one minute step toward forming a safer and more equitable environment. We have to “actively and directly challenge white supremacist people, policies, institutions, and cultural norms.”¹⁹⁹

VII. MEASURING OUR PROGRESS, IF IT IS EVEN PROGRESS AT ALL

Progress is the concept of moving forward, onward movement toward some sort of advancement.²⁰⁰ When we speak about making social progress it implies that we have progressed from one (worse off) place to something better, more advanced. But if oppression is cyclical, how are we able to progress forward? Legal scholar and one of the originators of Critical Race Theory, Derrick Bell, argues that those who advocate on behalf people of color, “seem trapped in a giant, unseen gyroscope.”²⁰¹ “Society’s stability is enhanced rather than undermined by the movement up through the class ranks of the precious few who too quickly are deemed to have ‘made it.’”²⁰² Bell recommends that we address racism the way we address death, that it is inevitable and cannot be stopped.²⁰³ Measuring our progression off of the success of the “best and brightest” ignores the “evidence of racial retrogression” that is “most obvious in the ever-worsening condition of many [B]lack people.”²⁰⁴ Bell states that the “fortunate few” are “unintentionally

<https://www.theatlantic.com/business/archive/2017/08/universities-inequality-fighters/538566/> (citing *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013)).

¹⁹⁷ Green, *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ KENDALL, *supra* note 2, at 257.

²⁰⁰ *Progress*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/progress> (last visited Mar. 17, 2021).

²⁰¹ Derrick Bell, *Racism Is Here To Stay: Now What?*, 35 HOWARD L.J. 79, 80 (1991).

²⁰² *Id.*

²⁰³ *Id.* at 89.

²⁰⁴ *Id.* at 84.

but no less critical components in the structure of racial subordination.”²⁰⁵ When a Black man, for instance, Barack Obama, makes it into spaces of power, it often feeds into the argument that America has given enough to Black people and that no more remedies are needed.²⁰⁶ There is a justification to maintain the racial status quo, the question of “you made it despite being [B]lack and subject to discrimination . . . so why can’t the rest of ‘them’ do the same?”²⁰⁷ So what do we do? Bell argues that if we realize that racism is inevitable, that it is not going anywhere, then it will lead to policies and positions that are “less likely to worsen conditions for those we are trying to help.”²⁰⁸

Many of us law students enter the profession because we want to change this status quo, go beyond just mitigating the harm. It is difficult to succumb to this idea that what we seek may not ever be possible, but we have to recognize that even right now as students, we are partaking in the white male supremacist institution that is the law. In 1895 Ida B. Wells writes about Frederick Douglass’ distinction of three eras of “Southern barbarism” where white men excuse the mass lynching of Black individuals.²⁰⁹ The three excuses consist of, the need to repress “race riots,” to prevent Black domination, and to protect white women.²¹⁰ Ida B. Wells illustrates striking parallels to the United States that we live in now. From the George Floyd protests, to white women weaponizing their tears against Black men, it is difficult to measure how much progress forward we have actually made.

Lately, I find myself tightrope walking between Bell’s ideology and a more optimistic hope for change. I entered the legal profession to gain access to the tools needed to deconstruct and reform the system from within, but is there ever a way to truly dismantle the master’s home by using the master’s tools? “What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow parameters of change are possible and allowable.”²¹¹ If the foundations of this country leave us stuck in a cycle of oppression, then maybe it is not a question of progress but only that of abolition?

²⁰⁵ Bell, *supra* note 201, at 87.

²⁰⁶ *See generally id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 90.

²⁰⁹ IDA B. WELLS-BARNETT, *THE RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES* 10 (Cavalier Classics 2015) (1895).

²¹⁰ *Id.* at 10–12.

²¹¹ Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 111 (Crossing Press rev. ed. 2007) (1984) [hereinafter Lorde, *The Master’s Tools*].

VIII. CONCLUSION: TO USE THE MASTER'S TOOLS OR NOT?

Growing up, many of us are taught to not see our differences, a teaching of colorblindness, which results in those of us who are privileged not seeing the variations of discrimination and oppression. When we say we are colorblind, we are not only ignoring the ways in which racism exists, but we are also telling people who are negatively racialized that they are invisible, by “denying the very fabric of their being.”²¹² White women often perpetuate this problematic practice through colorblind sisterhood – we are all one, fighting the same fight.²¹³ Audre Lorde states, “[a]s women, we have been taught either to ignore our differences, or to view them as causes for separation and suspicion rather than as forces for change.”²¹⁴ We need community to reach liberation, “[b]ut community must not mean a shedding of our differences, nor the pathetic pretense that these differences do not exist.”²¹⁵ Academic feminists often fail “to recognize difference as a crucial strength [which] is a failure to reach beyond the first patriarchal lesson. In our world, divide and conquer must become define and empower.”²¹⁶ Ignoring our differences, and the ways we benefit from oppression will only make us vulnerable to the oppressors.

In order to dismantle the systems of oppression that we work within we have to evaluate the roles we play and the tools we use within the system. “We must work to unlearn the harmful narratives we’ve been taught and that we created in response to white supremacy.”²¹⁷ We need to carry the weight in whatever way we can and confront the consequences of our silence. When we sit in our classes of predominately white peers, generally led by white professors, we have to use the power we hold as white women to push back on oppressive norms. We have to challenge our professors and deans when they fail to properly address the disparities within the law, which they too often do. Because if we don’t, the alternative is to participate in the mental and emotional abuse of our peers. “Mainstream communication does not want women, particularly white women, responding to racism. It wants racism to be accepted as an immutable given in the fabric of your

²¹² Larry Ferlazzo, *Saying ‘I Don’t See Color’ Denies The Racial Identity of Students*, ED. WEEK (Feb. 2, 2020), <https://www.edweek.org/teaching-learning/opinion-saying-i-dont-see-color-denies-the-racial-identity-of-students/2020/02>.

²¹³ See generally KENDALL, *supra* note 2, at 1–14.

²¹⁴ Lorde, *The Master’s Tools*, *supra* note 211, at 112.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ KENDALL, *supra* note 2, at 94.

existence.”²¹⁸ We cannot bend to the system and let it use us as pawns to white supremacy.

“Every woman has a well-stocked arsenal of anger potentially useful against those oppressions, personal and institutional, which brought that anger into being.”²¹⁹ As women, our emotions and reactions are constantly policed, even more so for women whose identities are negatively racialized.²²⁰ Tone policing is a way to invalidate someone for communicating in an emotionally charged manner.²²¹ Tone policing is also a tool used by the oppressor to “[undermine] anti-racism efforts because it can cast doubt on the validity of statements of oppression, racism, and discrimination” by implying that the “message holds no value if [it] is accompanied by emotion.”²²² But “we cannot allow our fear of anger to deflect us nor seduce us into settling for anything less than the hard work of excavating honesty.”²²³ “[A]nger expressed and translated into action in the service of our vision and our future is a liberating and strengthening act of clarification.”²²⁴ Racist tropes of the ‘angry Black woman’ and ‘angry woman of color’ make it much more exhausting for Black women, Indigenous women, and women of color to speak up, especially in institutions that work to silence them.²²⁵ Often for women who are negatively racialized, expressing anger can be dangerous, which makes it even more important for white women to use our anger as a tool to push back against oppressors and to normalize the expression of emotions.²²⁶

Embracing our anger as women is in itself a rejection of one of the master’s many tools. Issues surrounding the racist and sexist status quo of the law can broadly be attributed to the objectivity standard based on white hetero male thought.²²⁷ As law students we are purposely taught to take into practice the black letter law without thinking about the Black, Latinx, women, immigrants and other marginalized communities who were written

²¹⁸ Audre Lorde, *The Uses of Anger: Women Responding to Racism*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 124, 129 (Crossing Press rev. ed. 2007) (1984) [hereinafter Lorde, *The Uses of Anger*].

²¹⁹ *Id.* at 127.

²²⁰ Janice Gassam Asare, *Tone Policing is a Little-Known Microaggression That’s Common in the Workplace – Here’s How to Identify It*, *BUS. INSIDER* (Aug. 17, 2020, 6:40 AM), <https://www.businessinsider.com/how-to-identify-and-help-stop-tone-policing-in-workplace-2020-8>; see also Lorde, *The Uses of Anger*, *supra* note 218, at 124–33.

²²¹ Asare, *supra* note 220.

²²² *Id.*

²²³ Lorde, *The Uses of Anger*, *supra* note 218, at 129.

²²⁴ *Id.* at 127.

²²⁵ Asare, *supra* note 220.

²²⁶ *Id.*

²²⁷ See generally Crenshaw, *supra* note 9795.

out of the law and oppressed by it.²²⁸ Beginning in the classroom, white women need to push back on the objective and challenge our professors and administrations to speak on the subjective harm created by our legal system.

So far, I have expressed how we should reject the master's tools while working within his home, falling in line with Audre Lorde's distinguished statement that the "master's tools will never dismantle the master's house."²²⁹ So is tossing out the tools that built and maintain these oppressive systems the only true way to work within them? I am of the belief that we may have to use the master's tools as a point of entry, but it is from there that we have to acknowledge our place within the system and repudiate the status quo. In order to find our role, we need to appreciate our differences and act accordingly. For women who are negatively racialized, just existing in these abusive institutions should be enough. Lorde states, "[f]or in order to survive, those of us for whom oppression is as American as apple pie have always had to be watchers, to become familiar with the language and manners of the oppressor, even sometimes adopting them for some illusion of protection."²³⁰ Assimilation and the use of the master's tools is generally necessary for many people to survive within oppressive systems.²³¹

In a country based on individualism and nationalism, forms of dissent are often met with the suggestion to just 'get out.' But where does that then leave us? Take law school for instance, if we collectively decided to avoid working within the legal world because of its history of maintaining white male supremacy, then it would just further maintain the status quo of white men in power. I cannot say it definitively, but I am leaning towards the belief that these predominately white male spaces need to be infiltrated first and then dismantled. That being said, those of us who can participate in these institutions without it causing detrimental personal harm, are the ones responsible for abolishing the status quo.

²²⁸ T. Anansi Wilson, JD, *Race, Sexuality and the Law* (Fall 2020), U.C. Hastings, College of the Law.

²²⁹ Lorde, *The Master's Tools*, *supra* note 211, at 112.

²³⁰ Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Differences*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 115, 116 (Crossing Press rev. ed. 2007) (1984).

²³¹ *See generally id.*; Yoshino, *supra* note 34.