

Jeffrey Epstein: Pedophiles, Prosecutors, and Power

“This isn’t about bad men, though they were most assuredly bad men . . . It’s about a system that is void of integrity. Mistakes can happen. But if you don’t do anything to stop them from happening again, you can’t keep calling them mistakes.”¹

*Blanche Bong Cook*²

Abstract:

Jeffrey Epstein, a wealthy, white, billionaire child rapist, ran an international sex trafficking ring. Rather than prosecute Epstein, Alex Acosta, a former United States Attorney, brokered a deal with Epstein’s defense attorneys coined, “the sweetheart deal of the century.” When Acosta abdicated his role as a state functionary and allowed Epstein’s defense attorneys to dictate the terms of Epstein’s freedom, Acosta gave the power of the State to private parties to protect a recidivist child rapist.

The failure to prosecute Epstein is all the more problematic because it sits at the epicenter of mass incarceration. Through its carceral system, the United States disappears persons of color from existence, the political process, and the capacity to reproduce at rates both unprecedented and staggering. Epstein, however, inhabited a body that dictated the unprecedented process he received. Long before law enforcement discovered scores of Epstein’s child victims, Epstein’s race, class, and gender (his white

¹ David Greenwald, *Eye on the Courts: Demise of Local Deputy DA’s Underscores Problem with System*, DAVIS VANGUARD (Jan. 31, 2014), <https://www.davisvanguard.org/2014/01/eye-on-the-courts-demise-of-local-deputy-das-underscores-problem-with-system> [<https://perma.cc/KF42-AD66>].

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heteropatriarchal privilege) incentivized the federal government to decline prosecuting him. Epstein’s body prescribed his humanity, while his victims, often poor and female, lacked humanity and received no process. Acosta declined to prosecute Epstein, when the United States incarcerates more people than any other county in the whole of human history when there is a desire to prosecute.

The preferential treatment prosecutors conferred upon Epstein demonstrates prosecutors’ active involvement in the social construction of white supremacy, white heteropatriarchy, white innocence, and Black demonry. The failure to prosecute Epstein constructs white male ruling class innocence in the same way that hyperincarceration constructs Black guilt. Both are sides of the same hegemonic coin. Epstein demonstrates the ways in which prosecutors distribute premature death in vulnerable communities and life and liberty for the rich and powerful. Epstein dramatically illustrates that white heteropatriarchy is the result of both individual decision-making and structural dynamics within the criminal legal process. This two-tiered system of criminal justice, life for the powerful and death and destruction for the vulnerable, solidifies calls for abolition. Abolitionism, thus, becomes neither hyperbolic nor hysterical, but rather, a measured and reasonable response to a criminal justice system that targets vulnerable communities for cultural trauma and freedom for the powerful.

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INTRODUCTION

Jeffrey Epstein, a wealthy, white, billionaire child rapist, ran an international sex trafficking ring.³ His scheme involved child molestation

³ Ali Watkins & Vivian Wang, *Jeffrey Epstein Is Accused of Luring Girls to His Manhattan Mansion and Abusing Them*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/nyregion/jeffrey-epstein-sex-trafficking.html>

charges against several powerful white men, specifically Prince Andrew (the Duke of York),⁴ former United States President Donald Trump,⁵ Harvard law professor Alan Dershowitz, former New Mexico Governor Bill Richardson, former United States Senator George Mitchell, hedge fund manager Glenn Dubin, hotel magnate Tom Pritzker, and the late MIT scientist Marvin Minsky.⁶ The full extent of Epstein's pathology and those of his co-conspirators, aiders, and abettors will never be known. Alex Acosta, the United States Attorney for the Southern District of Florida, allowed Epstein to avoid federal prosecution for allegedly raping several children and to instead plead to state charges of soliciting a child prostitute (an oxymoron, referring to a child as a "prostitute"). As part of the plea bargain, Acosta agreed to an unprecedented non-prosecution agreement (NPA) that immunized all of Epstein's named and unnamed co-conspirators. The NPA also allowed Epstein to evade a life sentence in a federal prison in favor of a thirteen-month sentence in the private wing of a local jail, where law

[<https://perma.cc/6WJH-CQ98>]; Julie K. Brown, "He Thought He Was Untouchable": Jeffrey Epstein's Sex Abuse Victims Express Their Outrage, *MIAMI HERALD* (Aug. 27, 2019, 8:27 AM), <https://www.miamiherald.com/news/state/florida/article234417847.html> [<https://perma.cc/N35J-W7CJ>] [hereinafter *He Thought He Was Untouchable*]. It should be noted that the age of consent in New York is 17; in Florida it is 18.

⁴ Nicole Hong, *Prince Andrew Offers 'Zero Cooperation' in Epstein Case, Prosecutor Says*, *N.Y. TIMES* (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/nyregion/jeffrey-epstein-prince-andrew.html> [<https://perma.cc/85E4-K6QF>] ("One of Mr. Epstein's accusers, Virginia Roberts Giuffre, has said that Mr. Epstein trafficked her to Prince Andrew when she was 17 years old. She said she had sex with the prince three times, including once at Ms. Maxwell's home."). After being publicly disgraced and losing his military titles, Prince Andrew settled the case Giuffre filed against him for an undisclosed amount. Jesus Jiménez, *Prince Andrew Has Paid Settlement to Virginia Giuffre, Her Lawyer Says*, *N.Y. TIMES* (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/us/prince-andrew-virginia-giuffre-settlement-paid.html> [<https://perma.cc/3ZNY-5STA>].

⁵ Although Trump vehemently denies the allegations, at least twenty-six women have accused him of sexual assault. Eliza Relman, *The 26 Women Who Have Accused Trump of Sexual Misconduct*, *BUS. INSIDER* (Sept. 17, 2020, 3:04 PM), <https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12> [<https://perma.cc/QE24-R8J6>].

⁶ *He Thought He Was Untouchable*, *supra* note 3. Giuffre has alleged in court that Epstein directed her to have sex with many powerful people, including one of his lawyers, Alan Dershowitz; Prince Andrew; former New Mexico Gov. Bill Richardson; former U.S. Sen. George Mitchell; hedge fund manager Glenn Dubin; hotel magnate Tom Pritzker; and the late MIT scientist Marvin Minsky. All of these men, with the exception of Minsky, have vehemently denied these allegations. It should be noted that Minsky did not deny the allegations because he died before the allegations became public. *Jeffrey Epstein Is Gone, but Allegations Against Powerful Associates Linger*, *TAMPA BAY TIMES* (Aug. 10, 2019), <https://www.tampabay.com/breaking-news/jeffrey-epstein-is-gone-but-allegations-against-powerful-associates-linger-20190810> [<https://perma.cc/6YG4-5V35>].

enforcement released Epstein daily and allowed him to visit his private office for up to twelve hours a day.⁷

Epstein exemplifies the lengths prosecutors will engage to protect wealthy, powerful white male criminals. *Epstein*⁸ ultimately involved over 100 victims.⁹ Despite structural advantages that the Supreme Court has created for prosecutors during decades of mass incarceration, internal Department of Justice (DOJ) policies that urge zealous prosecution, and an arsenal of prosecutorial fire power, Acosta declined to prosecute Epstein. The failure to prosecute Epstein is all the more problematic because it occurred when mass incarceration was normative. The United States has perfected its ability to incarcerate by historic proportions. Hyperincarceration has disappeared persons of color from existence, the political process, and the capacity to reproduce at rates both astonishing and staggering. Given the punitiveness of the United States and the structural advantages prosecutors command over suspects, what accounts for the failure to prosecute Epstein? To address that question, this Article explores three central concepts: (1) inversion, (2) distribution, and (3) abolition.

First, white heteropatriarchy—that is power as it is raced, classed, and gendered—inverts process. The preferential treatment white, male, and elite prosecutors conferred upon Epstein epitomizes the ability of white heteropatriarchy to invert the criminal legal system for the favored, where villains become victims and victims become villains: the old-boy network

⁷ Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html> [<https://perma.cc/TUL6-UHPQ>] [hereinafter *How a Future Trump Cabinet Member*].

⁸ For ease of reference, I will refer to the Epstein case as “*Epstein*.”

⁹ Matthew Goldstein, *Fund for Jeffrey Epstein's Victims Has Paid Out More Than \$121 Million*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/business/jeffrey-epstein-victims-fund.html> [<https://perma.cc/59Q2-3USH>]. Also, the use of the term “victim” to reference both male and female sex trafficking victims remains a highly controversial issue. Many activists, scholars, judge, and practitioners prefer to use the term “survivor” when referencing sex trafficking victims. I use the term “victim” to highlight, underscore, and bring into sharp relief the offensive, violative, and assaultive conduct that constitutes sex trafficking, which is not to argue or insinuate that victims are only victims or should be reduced to victimization alone. Rather, sex trafficking victims are clearly entitled to the entire spectrum, plethora, and panoply of human complexity, including resiliency and brilliance. The use of “victim” in this piece is meant to highlight the criminal behavior of the perpetrator. Sex trafficking victims are no more enveloped by victimization than burglary victims; however, burglary victims are entitled to identify themselves as “victims” (persons who have been aggrieved) without directly or indirectly questioning their agency. The operation of sex trafficking victims’ “agency” is a major theme in this piece. This piece asserts that agency cannot be viewed outside the context of power. Moreover, a sex trafficking victim’s victimization can be announced without calling into question her ability to exercise agency. Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 228 (2019) [hereinafter *Stop Traffic*].

sweeps the crimes of network members under the carpet and revictimizes sexualized violence casualties. Much like cases involving police officer shootings of the societally vulnerable, such as Breonna Taylor, Michael Brown, Tamir Rice, and Eric Garner,¹⁰ the criminal legal process, specifically the prosecutors and law enforcement investigators, vilified the victims and liberated the perpetrators. Rather than expose Epstein to a life sentence, Acosta and other prosecutors colluded with Epstein's defense team to create a wall of silence, presenting a narrative about child "prostitutes" rather than child rape.¹¹ Victim blaming is particularly effective in both *Epstein* and police shooting cases because it renders the pathology of the perpetrator invisible by removing accountability from the perpetrator and shifting blame onto the victim.¹² Furthermore, this absence of accountability licensed Epstein's sexualized violence with impunity and enabled him to continue violating children. Like failed adjudications involving police shootings of the societally vulnerable, the failure to prosecute Epstein and the prosecutors' collusion with Epstein's defense attorneys enacted the same task as the violence itself—the exploitation and vilification of the victim, the overvalorization or hypervalorization of the assailants, and the reassurance of white heteropatriarchal order, entitlement, and preeminence.¹³

As Professor India Thusi incisively argues, critiques of excessive incarceration often focus on the race of the incarcerated, paying little, if any attention to "the roles of Whiteness and White supremacy as the underlying logics and norms that drive much of the bias in the system."¹⁴ In *Epstein*, it was the intertwined, enmeshed white heteropatriarchy of the suspect, defense attorneys, and the prosecutors that dictated the outcome, namely the embodiment of all facilitated exoneration.¹⁵ Long before law enforcement

¹⁰ Erica Schweigershausen, *Will We Ever Know How Many Girls Jeffrey Epstein Abused?*, THE CUT (July 19, 2019), <https://www.thecut.com/2019/07/how-many-jeffrey-epstein-victims-are-there.html> [<https://perma.cc/J45U-JDF2>]. In June 2014, Officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri, after Wilson ordered Brown to stop walking in the street. In November 2014, Officer Timothy Loehmann shot and killed twelve-year-old Tamir Rice while he was playing with a toy gun in a park. In July 2014, Officer Daniel Pantaleo strangled Eric Garner to death in New York City. Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Death of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), <https://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html> [<https://perma.cc/QL8-6ECS>]; Ursula Perano, *Death Without Consequences*, AXIOS (Sept. 14, 2020), <https://www.axios.com/police-killings-black-lives-8fbd7c70-486a-4231-824f-fbd9faa4a817.html> [<https://perma.cc/R5TK-ZCK3>].

¹¹ *Stop Traffic*, *supra* note 9, at 150.

¹² *Id.* at 149.

¹³ *Id.* at 150.

¹⁴ India Thusi, *The Pathological Whiteness of Prosecution*, 110 CAL. L. REV. 795, 800 (2022).

¹⁵ Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 154 (2021).

discovered scores of Epstein's child victims, Epstein's race, class, and gender (his white heteropatriarchal privilege) prompted the federal government to recognize his perceived, overriding innocence and decline prosecution. His embodiment preceded the evidence. Moreover, Epstein's body prescribed his humanity, while his victims, often poor and female, lacked humanity and received no process.

The preferential treatment Epstein received reflected a value judgment between himself and his victims. Judgment, therefore, represents the relative value of the suspect and his victims; Here a white heteropatriarch trumping vulnerable child victims of sexualized violence.¹⁶ This Article adds to existing criminal legal scholarship by heeding Thusi's clarion call to probe not only white supremacy as a norm of process, but it deploys an intersectional lens of white heteropatriarchy to map the race, class, and gender norms that drive the bias in prosecutorial decision-making. This piece attempts to make known and knowable the obfuscated norm of whiteness and white heteropatriarchy as facilitators in racially disparate outcomes in federal sex trafficking prosecutions.¹⁷

Second, *Epstein* demonstrates the ways in which prosecutors distribute premature death in vulnerable communities and life and liberty for the elite. The conduct of prosecutors in *Epstein* reveals their active participation in the social construction of white supremacy, white heteropatriarchy, white innocence, and Black demonry. Exonerating Epstein constructs white male ruling class innocence in the same way that hyperincarceration constructs Black guilt. Both are sides of the same hegemonic coin. *Epstein* dramatically illustrates that white heteropatriarchy is the result of both individual decision-making and structural dynamics within the criminal legal process.¹⁸ When Acosta abdicated his role as a State functionary and allowed Epstein's defense attorneys to dictate the terms of Epstein's freedom, Acosta surrendered the power of the State to private parties to protect a recidivist child rapist. The failure to prosecute Epstein further illustrates how the State becomes a weaponized ideological form of death. The ideology is white heteropatriarchy. Prosecutors materialize white heteropatriarchy through their charging decisions, plea bargaining, and sentencing dynamics. The end result is freedom for white heteropatriarchs and death and destruction for the racialized other.

Finally, this two-tiered system of criminal justice, life for the powerful and death and destruction for the vulnerable, solidifies calls for abolition.

¹⁶ *Stop Traffic*, *supra* note 9, at 182 (arguing that triers of fact make a relative value judgment between victims and assailants as reflected in the verdict).

¹⁷ Thusi, *supra* note 14, at 800.

¹⁸ *Id.* at 870.

Juxtaposing *Epstein* with rates of hyperincarceration makes abolitionism neither hyperbolic nor hysterical, but rather, a measured and reasonable response to a criminal justice system that targets vulnerable communities for cultural trauma and secures freedom for the powerful. As Thusi sagely observes, the system is highly flawed at best and perhaps rotten to the core at worst, rendering efforts at reform futile.¹⁹ Epstein presents a case study in abolition.

This Article proceeds in four Parts. Part I sets forth the facts of *Epstein*, more specifically the overwhelming evidence against him. Part II sets forth the legal arguments and methods that federal prosecutors could have used to charge Epstein with federal sex trafficking—had there been a will to prosecute him. Parts I and II jointly make the case for successfully charging Epstein federally. Part III historically contextualizes the failure to prosecute Epstein in an era of mass incarceration and the simultaneous underprosecution of sexualized violence. Part III also introduces white heteropatriarchy as the theoretical lens to grasp fully the failure to prosecute Epstein as well as the role of white heteropatriarchy in constructing race in the criminal legal process. Finally, Part IV argues that this two-tiered system of process facilitates demands for abolition. Short of a massive overhaul of the criminal legal process, however, transparency in prosecutorial decision-making along with bias training are, at a bare minimum, fundamentally necessary to curtail the trappings of white heteropatriarchy as operative norms in the prosecutorial function.

Before proceeding further, I want to underscore several points: I write not just as a sex trafficking scholar but as former federal prosecutor who specialized in large scale federal sex trafficking prosecutions.²⁰ I know the Department of Justice is a class act juggernaut of indictments, convictions, and sentencing—when there is a will to prosecute. Parts I and II exhaustively explore litigation strategies and theories that could have been used against Epstein. And yet, *Epstein* exemplifies the reason for the #MeToo movement. As journalist Julie K. Brown and Professor Marci Hamilton have argued, *Epstein*, like Harvey Weinstein, is not a story about individual bad actors; instead, it is a story about the complicity of the criminal legal process in facilitating rape and rape culture through prosecutorial collusion, victim

¹⁹ *Id.* at 796.

²⁰ In adopting the “subject position,” I reference here Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563 (2020) (citing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know that it’s a bad morning.”)).

blaming, and the refusal to recognize the humanity of victims.²¹ It is a story about how white heteropatriarchy creates racialized, classed, and gendered hierarchies that result in disparate material realities.

Greater public awareness about a larger problem of underprosecuted sex crimes and what Thusi calls the “pathology of prosecutors,” are all long overdue.²² Hamilton has argued that what Acosta and other prosecutors did mirrors what powerful religious institutions have done to protect pedophiles in their midst, namely silence the victims and protect the offenders. As Hamilton argues, “The orchestration of power by men only is protected as long as everybody agrees to keep it secret. This is a story the world needs to hear.”²³

I. FACTS OF THE EPSTEIN CASE ²⁴

Epstein involves at least two sets of atrocities: (1) Epstein’s violation of his victims; and (2) the prosecutors’ violation of Epstein’s victims. For decades, Epstein raped children with the assistance of male and female co-conspirators and directed some of his co-conspirators to participate in the rapes. As part of his sex trafficking ring, Epstein provided children to others for raping, male and female. Compounding the trauma Epstein’s victims

²¹ Julie K. Brown is the Miami Herald journalist who pursued the story of Epstein’s case after he received the sweetheart deal from Acosta in Florida. She located Epstein’s victims and persuaded them to tell their stories. Eight months after she published her first story about Epstein and ten years after Epstein was released early from his Florida prison sentence, the FBI–NYPD Crimes Against Children Task Force arrested Epstein when his plane landed in Teterboro, New Jersey. Alex Acosta, who by then was Donald Trump’s Secretary of Labor, resigned six days after Epstein was arrested. Andrew Anthony, *Meet Julie K. Brown, the Journalist Who Brought Down Jeffrey Epstein*, GUARDIAN (July 25, 2021), <https://www.theguardian.com/us-news/2021/jul/25/meet-julie-k-brown-the-woman-who-brought-down-jeffrey-epstein> [https://perma.cc/6U44-ZEGS]; Jan Ransom, *Cyrus Vance’s Office Sought Reduced Sex-Offender Status for Epstein*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/nyregion/cyrus-vance-epstein.html> [https://perma.cc/HQU5-7LR6]. Marci Hamilton, a University of Pennsylvania law professor, is a leading advocate of reforming laws involving sex crimes against children. *Marci Hamilton*, FELS INST. OF GOV’T, UNIV. OF PA., <https://web.archive.org/web/20220219082406/https://www.fels.upenn.edu/academics/instructors/marci-hamilton> [https://perma.cc/PX4S-N7GZ].

²² Thusi, *supra* note 14, at 800, 809 (arguing “criminal law scholarship is often missing a consideration of the roles of Whiteness and White supremacy as the underlying logics and norms that drive much of the bias in the system.”).

²³ *How a Future Trump Cabinet Member*, *supra* note 7.

²⁴ I have drawn the facts in this article largely from the outstanding investigative journalism of Julie Brown. JULIE K. BROWN, *PERVERSION OF JUSTICE: THE JEFFREY EPSTEIN STORY* (2021); see also *He Thought He Was Untouchable*, *supra* note 3; *How a Future Trump Cabinet Member*, *supra* note 7.

experienced, federal prosecutors colluded with Epstein's attorneys to violate the victims' rights under the Crime Victims' Rights Act.²⁵ This Part proceeds in three sections: (A) a brief background leading up to the prosecutorial failure; (B) a general background regarding Epstein and his prosecution; and (C) facts specific to the collusion between federal prosecutors and Epstein's defense team.

A. Background Leading to Prosecutorial Complicity

The story of Jeffrey Epstein is a labyrinth of ruling-class white heteropatriarchal pathology and power. While Epstein was alive, he amassed a fortune and used it to sex traffic scores of girls, many of whom were poor and under the age of eighteen.²⁶ From 1999 to 2007, Epstein sexually abused girls in a sex trafficking ring that spanned the globe, including his opulent estates in Palm Beach, Florida; New York City, New York; Paris, France; and Little Saint James, his private island in the Virgin Islands.²⁷ Epstein's intimate circle of power brokers included former President Donald Trump, former President Bill Clinton, and Prince Andrew, Duke of York.²⁸ Citing his little black book of celebrities, politicians, Pulitzer Prize winners, and celebrity lawyers, commentators observed that he brought "a trophy-hunter's zeal to his collection of scientists and politicians."²⁹ Trump famously quipped that Epstein is a "[t]errific guy . . . [who] likes beautiful women as much as I do, and many of them are on the younger side."³⁰

²⁵ Doe 1 v. United States, 359 F. Supp. 3d, 1201, 1218 (S.D. Fla. 2019) (holding that "it is undisputed that the Government entered into a NPA with Epstein without conferring with Petitioners [(Epstein's victims)] during its negotiation and signing" and instead sent them letters directing them to exercise "patience" with the investigation of Epstein even after the Government entered into the NPA); *see also* 18 U.S.C. § 3771 (2015).

²⁶ James Barron, *Who Is Jeffrey Epstein? An Opulent Life, Celebrity Friends and Lurid Accusations*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/nyregion/jeffrey-epstein-who-is-he.html> [<https://perma.cc/8EZK-E7DU>] ("In 2015, when the now-defunct site Gawker published what it said was his address book, there were entries for three Trumps (Donald, his ex-wife Ivana and their daughter Ivanka); Michael R. Bloomberg, the former mayor; the actors Alec Baldwin and Dustin Hoffman; the singer and songwriter Jimmy Buffett (whose name was misspelled); and the Nobel Peace Prize winner Elie Wiesel, among many others.").

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Ellen Cranley & Benjamin Goggin, *The Life of Jeffrey Epstein, the Convicted Sex Offender and Well-Connected Financier Who Died in Jail Awaiting Sex Trafficking Charges*, BUS. INSIDER (Aug. 10, 2019, 9:47 AM), <https://www.businessinsider.com/jeffrey-epstein-life-biography-net-worth-2019-7> [<https://perma.cc/4ERV-T47L>].

Epstein, a college dropout, briefly taught math at the prestigious Dalton School in Manhattan and then worked at Bear Stearns, a powerful Wall Street investment bank.³¹ Epstein marketed himself as a tax expert with a gift for devising investment schemes.³² As he amassed a fortune, Epstein purchased the largest private residence in Manhattan; homes in Paris, and Miami; and the entire island of Little Saint James.³³

Despite his humble origins as the son of a City Parks Department employee,³⁴ Epstein acquired the favor of rich and powerful white heteropatriarchs. Within years of meeting Epstein, billionaire Leslie H. Wexner, Chief Executive of L. Brands, the parent company of Victoria's Secret, The Limited, and Bath & Body Works, handed Epstein "sweeping powers over his finances, philanthropy and private life."³⁵ Wexner, Epstein's only known major client,³⁶ authorized Epstein to borrow money on his behalf, sign his tax returns, hire employees, and buy and sell properties.³⁷ Over several years, Epstein acquired a New York mansion, a private plane, and a luxury estate in Ohio—valued at roughly \$100 million—that Wexner or his companies had previously owned.³⁸ Like many in Epstein's charmed circle, Wexner denied any knowledge of Epstein's child molestation.³⁹

Courtney Wild, whom Epstein raped when she was fourteen years old, described Epstein's modus operandi as follows: "Jeffrey preyed on girls who were in a bad way, girls who were basically homeless."⁴⁰ He went after girls

³¹ Emily Steel et al., *How Jeffrey Epstein Used the Billionaire Behind Victoria's Secret for Wealth and Women*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/business/jeffrey-epstein-wexner-victorias-secret.html> [<https://perma.cc/GSD6-KQKC>].

³² *Id.*

³³ Cranley & Goggin, *supra* note 30.

³⁴ Barron, *supra* note 26.

³⁵ Steel et al., *supra* note 31.

³⁶ Barron, *supra* note 26.

³⁷ Julie K. Brown, *Cops Worked to Put Serial Sex Abuser in Prison. Prosecutors Worked to Cut Him a Break*, MIA. HERALD (Nov. 28, 2018), <https://web.archive.org/web/20181129000848/https://www.miamiherald.com/news/local/article214210674.html> [<https://perma.cc/3ZWG-T87A>] [hereinafter *Cops Worked to Put Serial Sex Abuser in Prison*].

³⁸ *Id.*

³⁹ Steel et al., *supra* note 31.

⁴⁰ *How a Future Trump Cabinet Member, supra* note 7; see also Frances Robles et al., *Examining Acosta's Claims on the Epstein Prosecution*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/us/politics/acosta-epstein-fact-check.html> [<https://perma.cc/9NA3-E3NH>].

who he thought no one would listen to and he was right.”⁴¹ Before Epstein raped Wild, she was captain of a cheerleading squad, played first trumpet in the band, and was an A student in middle school.⁴² After Epstein, she became a drug-dependent stripper and an inmate in a Florida prison.⁴³ Wild served three years for a drug-related charge, over twice as long as the thirteen months Epstein served for raping children.⁴⁴ Wild stated that Epstein preferred girls who were white, prepubescent, and easy to manipulate.⁴⁵ By the time Wild was sixteen, she alone had delivered seventy to eighty fourteen- and fifteen-year-old girls to Epstein.⁴⁶

In 2008, the FBI identified at least thirty victims of Epstein’s sexual predation.⁴⁷ As a result, the United States Attorney’s Office for the Southern District of Florida prepared an eighty-two-page prosecution memorandum and a fifty-two-page indictment against Epstein that included sixty potential criminal counts of sexual misconduct and human trafficking.⁴⁸ Alex Acosta, United States Attorney for the Southern District of Florida at the time, never filed the indictment. Instead, Acosta declined to prosecute Epstein federally and agreed to a plea bargain that would have been unimaginable for offenders lacking Epstein’s race, wealth, and power. Acosta entered into a plea agreement with Epstein whereby Acosta forfeited federal prosecution against Epstein in exchange for Epstein’s pleading guilty to state prostitution charges against minors, an oxymoron of terms.⁴⁹ As argued in Part II, according to federal law, a child cannot be a prostitute because minors cannot consent to sex, let alone sex trafficking. Epstein would have faced up to life in prison on federal charges. Instead, he received an eighteen-month sentence on state charges.⁵⁰

⁴¹ *How a Future Trump Cabinet Member*, *supra* note 7.

⁴² *Id.*; *see also* Robles et al., *supra* note 40.

⁴³ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁴⁴ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁴⁵ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁴⁶ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁴⁷ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁴⁸ Matthew Goldstein & Katie Benner, *Justice Dept. Finds ‘Poor Judgment’ but No Misconduct in 2006 Jeffrey Epstein Inquiry*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/11/12/us/politics/jeffrey-epstein-justice-department-miami.html> [https://perma.cc/TQ4A-QFA3].

⁴⁹ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁵⁰ Goldstein & Benner, *supra* note 48.

B. *Epstein Used His Power to Rape Children for Sexual Pleasure and Political Gain*

In the summer of 1996, Epstein offered Maria Farmer, a struggling New York Academy of Art student, residence in his Ohio mansion.⁵¹ Eileen Guggenheim, a dean at the Academy, had introduced Farmer to Epstein.⁵² Farmer alleges that she met Donald J. Trump in Epstein's office, where Trump ogled her until Epstein informed him that "she's not for you."⁵³ Farmer alleges that while she was at Epstein's Ohio estate, both Epstein and his girlfriend Ghislaine Maxwell sexually assaulted her.⁵⁴ When she tried to call the police, Wexner's security guards trapped her.⁵⁵ After she returned to New York City, Farmer reported the incident to both the police and the FBI.⁵⁶ Less than a year after Epstein raped Farmer, Epstein attacked model Alicia Arden in his Santa Monica hotel room, where she believed she was being interviewed for a Victoria's Secret modeling job. Within a week, Arden reported the assault to the police.⁵⁷

In a civil action, Bradley Edwards, the attorney for several of Epstein's victims, and Paul G. Cassell, a former federal district court judge and University of Utah law professor, filed a motion alleging that Epstein forced a teenage girl to perform sex acts with both Prince Andrew and Alan M. Dershowitz, a Harvard Law professor and a member of Epstein's defense team.⁵⁸ Prince Andrew repeatedly denied the allegations, including in a fraught BBC interview detailing his denial.⁵⁹ With equal vehemence, Dershowitz denied, threatening to sue both Edwards and Cassell until they

⁵¹ Steel et al., *supra* note 31.

⁵² *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁵³ Mike Baker, *The Sisters Who First Tried to Take Down Jeffrey Epstein*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2019/08/26/us/epstein-farmer-sisters-maxwell.html> [<https://perma.cc/7J52-7H6M>].

⁵⁴ *Id.*

⁵⁵ Steel et al., *supra* note 31.

⁵⁶ Baker, *supra* note 53.

⁵⁷ Steel et al., *supra* note 31.

⁵⁸ Mark Landler, *Prince Andrew Talks About His Ties to Jeffrey Epstein, and Britain Is Appalled*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2019/11/17/world/europe/prince-andrew-epstein.html> [<https://perma.cc/YV3Q-RCLJ>]; Emma G. Fitzsimmons, *Prince Andrew and Alan Dershowitz Are Mentioned in Suit Alleging Sex With Minor*, N.Y. TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/04/us/prince-andrew-and-alan-dershowitz-are-named-in-suit-alleging-sex-with-minor.html> [<https://perma.cc/7N6X-FMHJ>].

⁵⁹ *Prince Andrew Newsnight Interview: Transcript in Full*, BBC NEWS (Nov. 17, 2019), <https://www.bbc.com/news/uk-50449339> [<https://perma.cc/V2AM-3PXA>].

were disbarred.⁶⁰ The court filings reveal that Epstein sexually abused another girl when she was fifteen years old and kept her as a “sex slave” from 1999 to 2002.⁶¹ Epstein trafficked her to other men to ingratiate himself with them and to collect information that could be used to blackmail them later, potentially protecting himself and his trafficking empire.⁶²

Epstein surrounded himself with numerous other elites including former President Bill Clinton, actor Kevin Spacey, and comedian Chris Tucker.⁶³ Epstein flew all three on his private jet, named the “Lolita Express,” to Africa so they could “tour AIDS project sites.”⁶⁴ This was the first of several flights Clinton took on Epstein’s plane. Epstein referred to his investment in aristocracy as his “collection.”⁶⁵

Although Epstein protected himself with the ruling class, in 2005 his fiefdom began to unravel.⁶⁶ A fourteen-year-old girl and her parents reported Epstein to the Palm Beach Police Department (PBPB). They alleged that Epstein paid her and a classmate to rape them.⁶⁷ They also alleged that Epstein’s two assistants, Haley Robson and Sarah Kellen, lured girls to Epstein’s Palm Beach estate to massage him.⁶⁸ Once in his bedroom, Epstein would direct the girls to strip, then assaulted them during and after the massage.⁶⁹ As part of their investigation, PBPB pulled Epstein’s trash and found papers with the girl’s names and cell phone numbers.⁷⁰

⁶⁰ Barry Meier, *Alan Dershowitz and 2 Other Lawyers Settle Suit and Counter Claim*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/12/business/alan-dershowitz-and-2-other-lawyers-settle-suit-and-counter-claim.html> [<https://perma.cc/2XE3-QZWB>].

⁶¹ Fitzsimmons, *supra* note 58.

⁶² *Id.*

⁶³ Landon Thomas Jr., *Jeffrey Epstein: International Moneyman of Mystery*, N.Y. MAG. (Oct. 28, 2022), https://nymag.com/nymetro/news/people/n_7912 [<https://perma.cc/SS4X-TXBS>].

⁶⁴ Cranley & Goggin, *supra* note 30.

⁶⁵ *Id.*

⁶⁶ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁶⁷ *Timeline of the Life and Crimes of Jeffrey Epstein*, CBS N.Y. (Aug. 10, 2019, 9:00 PM), <https://newyork.cbslocal.com/2019/08/10/timeline-of-the-life-and-crimes-of-jeffrey-epstein> [<https://perma.cc/VF75-G32T>]; *How a Future Trump Cabinet Member*, *supra* note 7.

⁶⁸ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁶⁹ *How a Future Trump Cabinet Member*, *supra* note 7.

⁷⁰ Amy Julia Harris et al., *How a Ring of Women Allegedly Recruited Girls for Jeffrey Epstein*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2019/08/29/nyregion/jeffrey-epstein-ghislaine-maxwell.html> [<https://perma.cc/7G5W-XETX>]; Sarah Fitzpatrick & Rich Schapiro, *Ex-Florida Police Chief: Epstein Case ‘The Worst Failure of the Criminal Justice System’ in Modern Times*, NBC NEWS (Sept. 20, 2019, 8:13 PM), <https://www.nbcnews.com/news/us-news/ex-florida->

Epstein purchased gifts for his victims, rented cars for them, had flowers delivered to their high schools, and paid for braces and testing for sexually transmitted infections.⁷¹ To corroborate the victims' stories and solidify the case against Epstein, PBPD pulled Epstein's trash and found floral delivery instructions and a report card for one of the girls⁷². They retrieved receipts for the cars he rented for the girls and the gifts he gave them.⁷³ Independent from each other, the victims corroborated the evidence by telling the identical story, including details about Epstein's genitals.⁷⁴ Several of Epstein's victims claimed that Epstein would invite Nadia Marcinkova, a young woman (over eighteen) that Epstein called his Yugoslavian sex slave, to join in while Epstein took photographs of the girls engaged in sexual acts.⁷⁵ He displayed the photographs on the walls of his mansion.⁷⁶ One victim explained that she often had sex with Marcinkova, who used strap-on dildos and other sex toys, while Epstein watched, directed, and choreographed.⁷⁷ The same victim stated that Epstein held her down on a table and raped her when she was sixteen.⁷⁸ Later, he apologized and paid her \$1,000.⁷⁹

PBPD ultimately identified approximately twenty girls from fourteen to seventeen whom Epstein sexually assaulted.⁸⁰ "This was not a 'he said, she said' situation," argued retired PBPD Chief Michael Reiter, who supervised the PBPD investigation.⁸¹ "This was [fifty]-something 'shes' and one 'he' — and the 'shes' all basically told the same story."⁸² PBPD obtained

police-chief-epstein-case-worst-failure-criminal-justice-n1057226 [https://perma.cc/2U8Z-7LAP]; *How a Future Trump Cabinet Member*, *supra* note 7; GEOFFREY BERMAN, HOLDING THE LINE: INSIDE THE NATION'S PREEMINENT US ATTORNEY'S OFFICE AND ITS BATTLE WITH THE TRUMP JUSTICE DEPARTMENT 150 (2022).

⁷¹ *How a Future Trump Cabinet Member*, *supra* note 7; Andrew Marra, *The Man Who Had Everything: Jeffrey Epstein Craved Big Homes, Elite Friends and Underage Girls*, PALM BEACH POST (July 17, 2019, 6:02 AM), <https://www.palmbeachpost.com/news/20190717/man-who-had-everything-jeffrey-epstein-craved-big-homes-elite-friends-and-underage-girls> [https://perma.cc/CPD5-DWHQ].

⁷² *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁷³ *How a Future Trump Cabinet Member*, *supra* note 7.

⁷⁴ *Id.*; *see also* Robles et al., *supra* note 40.

⁷⁵ *How a Future Trump Cabinet Member*, *supra* note 7.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1204–05 (S.D. Fla. 2019).

⁸¹ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

⁸² *How a Future Trump Cabinet Member*, *supra* note 7.

overwhelming corroboration of the victims' allegations, including phone records, copies of written phone messages from the girls found in Epstein's trash, and Epstein's flight logs, which confirmed that Epstein was in his Palm Beach estate on days when the girls were scheduled to massage him.⁸³

PBPD obtained an arrest warrant for Epstein, but in the first of a series of aberrant prosecutorial moves, Palm Beach County State Attorney Barry Krischer referred the charges to a grand jury.⁸⁴ A spokesperson for the State Attorney's Office later remarked that it was unprecedented to present a sexualized violence case to a grand jury. Under Florida law, grand juries hear first-degree murder cases.⁸⁵ Furthermore, instead of presenting evidence about all identified victims (at least thirteen had been identified at this point), Krischer's office only presented evidence to the grand jury about one of Epstein's victims and sought only one count of "prostitution."⁸⁶ Investigating officers found probable cause to charge Epstein with much more serious offenses: one count of lewd and lascivious molestation and four counts of unlawful sexual activity with a minor.⁸⁷ Ultimately, Epstein was indicted for solicitation of prostitution, a much less serious offense than soliciting sex with a minor.⁸⁸ Immediately, Epstein's defense team lobbied the prosecutors for pretrial diversion, avoiding any sentence.⁸⁹

During this pressure campaign from Epstein's defense teams, PBPD began to suspect that the Palm Beach State Attorney's Office was undermining their investigation.⁹⁰ Before the indictment, Reiter accused the local prosecutors of giving Epstein preferential treatment and demanded

⁸³ *Id.*

⁸⁴ *Timeline of the Life and Crimes of Jeffrey Epstein*, *supra* note 67.

⁸⁵ Jane Musgrave et al., *Palm Beach Post Investigation: Jeffrey Epstein Case—The First Failure*, PALM BEACH POST (Oct. 21, 2020, 6:12 PM), <https://www.palmbeachpost.com/epstein-case> [<https://perma.cc/Q3JJ-JA9N>] [hereinafter *Palm Beach Post Investigation*] ("Mike Edmondson, spokesman then and now for the State Attorney's Office, said it was the first time a sex-related case was presented to the grand jury, which, by law, is required to hear only first-degree murder cases."); Abby Goodnough, *Questions of Preferential Treatment Are Raised in Florida Sex Case*, N.Y. TIMES (Sept. 3, 2006), <https://www.nytimes.com/2006/09/03/us/03epstein.html> [<https://perma.cc/9LBV-RWZZ>] ("In Florida, prosecutors usually refer only capital cases to grand juries.").

⁸⁶ *Timeline of the Life and Crimes of Jeffrey Epstein*, *supra* note 67.

⁸⁷ Goodnough, *supra* note 85.

⁸⁸ *Palm Beach Post Investigation*, *supra* note 85.

⁸⁹ *Id.* Krischer's handling of *Epstein* was so unorthodox that the Florida Governor Ron DeSantis called for an investigation. According to news reports, Krischer made a determination that the victims lacked credibility without interviewing them or their parents. According to court documents that the Palm Beach Post obtained, the lead prosecutor found that there were "no victims." *Id.*

⁹⁰ Fitzpatrick & Schapiro, *supra* note 70.

Krischer recuse himself.⁹¹ Finally, PBPD referred its investigation to the FBI.⁹² The FBI began investigating Epstein and his personal assistants for molesting girls aged fourteen to seventeen in Florida, New York, and New Mexico.⁹³ Investigators found that Epstein employed an international modeling agency to recruit girls as young as thirteen from Europe, Ecuador, and Brazil.⁹⁴ According to Maritza Vasquez, a former bookkeeper for MC2 Model Management, the modeling agency recruited the girls who lived in Epstein's mansion and Epstein paid for their visas.⁹⁵ By 2018, investigators had identified approximately eighty females who alleged that Epstein had molested or sexually abused them from 2001 to 2006.⁹⁶

C. Epstein's Unprecedented Process and Alex Acosta's Abdication

In 2007, Jay Lefkowitz, one of Epstein's attorneys, met with Acosta.⁹⁷ Instead of meeting at the United States Attorney's Office, which is customary throughout the Department of Justice (DOJ), the two men—both of whom were former attorneys with Kirkland & Ellis in Washington, D.C.—met for breakfast at the Marriott in West Palm Beach.⁹⁸ In an email documenting the meeting, Lefkowitz wrote Acosta stating, "Thank you for the commitment you made to me during our Oct. 12 meeting You . . . assured me that your office would not . . . contact any of the identified individuals, potential witnesses or potential civil claimants and the respective counsel in this matter."⁹⁹ Another of Epstein's lawyers emailed Acosta and directed him to refrain from having anyone from his office contact the victims.¹⁰⁰

⁹¹ Goodnough, *supra* note 85.

⁹² *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40 ("Local law enforcement officials and the F.B.I. referred the case to Mr. Acosta, in part because they feared Mr. Epstein would face no more than a single state charge related to prostitution, which warranted a fine and no jail time."); FBI, Jeffrey Epstein File, Part 1 of 22, <https://vault.fbi.gov/jeffrey-epstein/Jeffrey%20Epstein%20Part%2001%20of%2022> [<https://perma.cc/U8BF-K9KQ>].

⁹³ *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1205 (S.D. Fla. 2019); *How a Future Trump Cabinet Member*, *supra* note 7.

⁹⁴ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁹⁵ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁹⁶ *How a Future Trump Cabinet Member*, *supra* note 7.

⁹⁷ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

⁹⁸ *How a Future Trump Cabinet Member*, *supra* note 7.

⁹⁹ *Id.*

¹⁰⁰ *Doe 1*, 359 F. Supp. 3d at 1209 ("On October 10, 2007, [defense counsel Jay] Lefkowitz sent a letter to U.S. Attorney Alex Acosta stating, in pertinent part: 'Neither federal agents nor anyone from your Office should contact the identified individuals to inform them of the

In 2007, Acosta agreed to an unprecedented Nonprosecution Agreement (NPA). Among other things, the NPA gave Epstein control over whether his victims could sue him civilly.¹⁰¹ The NPA further stipulated that Epstein's attorneys could consult DOJ about the selection of civil lawyers for each victim, that Epstein would pay those lawyers, and that he would not contest liability.¹⁰² The purpose of these stipulations was to hide Epstein's assaults from the public.¹⁰³ Acosta allowed Epstein to stipulate that he was not admitting guilt by paying off his victims. Acosta also agreed that if anyone made state or federal Freedom of Information Act (FOIA) requests, the government would notify Epstein before granting the required disclosures.¹⁰⁴ Thus, the deal ensured that Epstein's lawyers were always apprised and the victims were erased.¹⁰⁵

Among other legal luminaries, Epstein's defense team included Dershowitz, who gained notoriety for defending football legend O.J. Simpson from charges that he murdered his former wife and her companion.¹⁰⁶ Epstein's bench also included Kenneth Starr, the independent prosecutor who prosecuted President Bill Clinton during his impeachment hearings for lying about his affair with legal intern Monica Lewinsky.¹⁰⁷ With an arsenal of nuclear firepower behind him, Lefkowitz leveraged the deal of

resolution of the case, including appointment of the attorney representative and the settlement process. Not only would that violate the confidentiality of the agreement, but Mr. Epstein also will have no control over what is communicated to the identified individuals at this most critical stage. We believe it is essential that we participate in crafting mutually acceptable communication to the identified individuals.”).

¹⁰¹ Julie K. Brown, *For Years, Jeffrey Epstein Abused Teen Girls, Police Say. A Timeline of His Case*, MIA. HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article221404845.html> [<https://perma.cc/5ASE-MRYT>] [hereinafter *For Years, Jeffrey Epstein Abused Teen Girls*]; see also Robles et al., *supra* note 40.

¹⁰² *Doe 1*, 359 F. Supp. 3d at 1207.

¹⁰³ *Doe 1*, 359 F. Supp. at 1207 (citing Feb. 21, 2019, Opinion and Order, “On September 18, 2007, the Office responded: ‘A[n] [NPA] would not be made public or filed with the Court, but it would remain part of our case file. It probably would be subject to a FOIA request, but it is not something that we would distribute without compulsory process,’” establishing that the implied purpose of the NPA was to keep information about *Epstein* from becoming public).

¹⁰⁴ *Id.* at 1208.

¹⁰⁵ *Id.* at 1209.

¹⁰⁶ Barry Meier, *Alan Dershowitz on the Defense (His Own)*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/business/alan-dershowitz-on-the-defense-his-own.html> [<https://perma.cc/BT5H-ZKNM>].

¹⁰⁷ Landon Thomas Jr., *Financier Starts Sentence in Prostitution Case*, N.Y. TIMES (July 1, 2008), <https://www.nytimes.com/2008/07/01/business/01epstein.html> [<https://perma.cc/W7JB-QH49>].

the century.¹⁰⁸ Starr told Acosta that his client would not agree to register as a sex offender, a statutory requirement.¹⁰⁹ Starr also rejected an addendum to the NPA that allowed victims to sue for compensation.¹¹⁰ Starr leveraged his connections at DOJ to request a review of the agreement, which took over a year. During that time, the FBI continued to identify more victims and evidence.¹¹¹ Despite substantial physical evidence and multiple witnesses, federal prosecutors and Epstein's defense attorneys entered the highly abnormal NPA.

Three strands of the NPA should be noted. First, Acosta abandoned any efforts to federally prosecute Epstein and instead allowed him to plead to two state child prostitution charges. Although federal charges exposed Epstein to life imprisonment, Epstein received an eighteen month sentence.¹¹² Under the NPA, Epstein admitted to committing only one offense against one underage girl, who was labeled a "prostitute," and who was fourteen when Epstein raped her.¹¹³ In remarking on the treatment of the fourteen-year-old, her attorney stated, "She was taken advantage of twice—first by Epstein, and then by the criminal justice system that labeled a [fourteen]-year-old girl as a prostitute."¹¹⁴ Epstein agreed to register as a sex offender and to pay restitution to three dozen victims the FBI had identified.¹¹⁵

Second, the NPA¹¹⁶ immunized Epstein and four of his accomplices from all federal charges. Incomprehensibly, Acosta also granted immunity from federal charges to "any potential co-conspirators."¹¹⁷ What makes this concession striking is that the NPA did not name the potential co-conspirators, thereby leaving the scope of the immunity to include limitless other accomplices, participants, facilitators, and rich powerful elites, all of

¹⁰⁸ *How a Future Trump Cabinet Member*, *supra* note 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *For Years, Jeffrey Epstein Abused Teen Girls*, *supra* note 101.

¹¹² *How a Future Trump Cabinet Member*, *supra* note 7.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Non-Prosecution Agreement, *Orseck v. Epstein*, No. 1:10-cv-21586 (S.D. Fla. 2010), available at <https://www.politico.com/f/?id=0000016b-d4e5-d768-ab6b-d4ffb11f0001> [<https://perma.cc/SD9E-YGMU>].

¹¹⁷ James Hill, *Key Takeaways from the Justice Department Review of Jeffrey Epstein Sweetheart Deal*, ABC NEWS (Nov. 16, 2020, 4:02 AM), <https://abcnews.go.com/US/key-takeaways-justice-department-review-jeffrey-epstein-sweetheart/story?id=74222922> [<https://perma.cc/NS58-M46A>].

whom were raping girls at Epstein's estates and on his plane and who were not identified at the time the NPA was executed. In effect, the NPA shut down the FBI investigation and eliminated additional victims and perpetrators in perpetuity.¹¹⁸ The degree to which it is unprecedented to immunize undiscovered criminal actors cannot be understated.

The deluge of preferential treatment Epstein and his organization received with respect to federal and state charges did not end with the charging decisions. On October 20, 2005, Epstein removed his computers from his Palm Beach estate before the FBI executed a search warrant.¹¹⁹ Although a grand jury had issued subpoenas for the computers, Acosta canceled the subpoenas and refused to force Epstein to comply with them.¹²⁰

Third, the Crime Victims' Rights Act of 2004 enumerates several rights for violent crime victims, including the right to be heard in plea and sentencing hearings.¹²¹ It also provides victims a right of conference; it mandates that prosecutors must confer with crime victims before entering into a plea agreement.¹²² Despite this federal mandate, Acosta agreed to conceal the NPA from Epstein's victims, thereby circumventing any chance that Epstein's victims or anyone else might ignite a public outcry that would derail the NPA.¹²³ Bradley Edwards, attorney for several of Epstein's victims, filed an emergency motion in federal court to block the NPA, but by the time the agreement was unsealed—over a year later—Epstein had already served his sentence and had been released from jail.¹²⁴

DOJ lavished Epstein with the kind of preferential treatment that most defendants can only dream of.¹²⁵ The NPA was not made public until more than ten years later and was so unprecedented that DOJ initiated an

¹¹⁸ *How a Future Trump Cabinet Member*, *supra* note 7.

¹¹⁹ *Jeffrey Epstein: How the Case Unfolded in Palm Beach County*, PALM BEACH DAILY NEWS (Nov. 13, 2019, 10:24 PM), <https://www.palmbeachdailynews.com/news/20191113/jeffrey-epstein-how-case-unfolded-in-palm-beach-county> [<https://perma.cc/8GBU-6KG2>].

¹²⁰ *Timeline of Jeffrey Epstein's Legal Troubles*, DAILYMAIL (July 10, 2019), <https://www.dailymail.co.uk/news/fb-7226537/JEFFREY-EPSTEIN-SWEETHEART-DEAL.html> [<https://perma.cc/X4CK-RV8Q>] (“October 2007: Acosta meets with Epstein's lawyer Jay Lefkowitz to finalize the terms of the plea deal. It is agreed that the victims would not be notified, the deal would be kept under seal and all grand jury subpoenas would be canceled—including the one for Epstein's computers, which were still at large.”).

¹²¹ 18 U.S.C. § 3771 (2015).

¹²² *See id.* § 3771(a).

¹²³ *How a Future Trump Cabinet Member*, *supra* note 7; *see also* Robles et al., *supra* note 40.

¹²⁴ *How a Future Trump Cabinet Member*, *supra* note 7.

¹²⁵ *Id.*

investigation into the federal prosecutors who struck the deal.¹²⁶ Summarizing law enforcement's reaction to Acosta's capitulation, Mike Fisten, a former Miami-Dade police sergeant, homicide investigator, and member of the FBI Organized Crime Task Force, stated that Acosta's deal flatly contradicted the overwhelming evidence that the FBI had against Epstein.¹²⁷

Like the unprecedented favoritism Epstein received throughout the plea negotiations, Epstein's paltry sentence and the way he served it stood in stark contrast to what millions of poor and underprivileged defendants, particularly during a time of mass incarceration, have endured. Epstein served less time for his heinous crimes than his former butler, Alfredo Rodriguez, served for trying to sell Epstein's little black book that named his elite circle. Rodriguez served eighteen months in federal prison on obstruction charges for not surrendering the black book.¹²⁸ Unlike other convicted sex offenders, Epstein did not serve his sentence in a Florida state prison. Instead, he served his time in a private wing of the Palm Beach County jail.¹²⁹ Despite its own policies that barred sex offenders from work release, the Palm Beach County Sheriff's Office gave Epstein work release privileges.¹³⁰ He was allowed to

¹²⁶ During the DOJ internal investigation, the Office of Professional Responsibility (OPR) under the Administration of then President Donald Trump, concluded that all five subjects it was investigating did not commit professional misconduct with respect to the development, negotiation, and approval of the NPA. Within the OPR's framework, professional misconduct requires a finding that a subject attorney intentionally or recklessly violated a clear and unambiguous standard governing the conduct at issue. The OPR found no clear and unambiguous standard that required Acosta to indict Epstein on federal charges or that prohibited his decision to defer prosecution to the State. Furthermore, according to the OPR, none of the individual terms of the NPA violated DOJ or other applicable standards. *See* U.S. DEP'T OF JUST., OFF. OF PRO. RESP., INVESTIGATION INTO THE U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF FLORIDA'S RESOLUTION OF ITS 2006–2008 FEDERAL CRIMINAL INVESTIGATION OF JEFFREY EPSTEIN & ITS INTERACTIONS WITH VICTIMS DURING THE INVESTIGATION, n.109, ix (2020), <https://www.justice.gov/opa/press-release/file/1336416/download> [<https://perma.cc/B9TF-XGV8>] [hereinafter OPR INVESTIGATION INTO THE U.S. ATTORNEY'S OFFICE].

¹²⁷ *How a Future Trump Cabinet Member*, *supra* note 7.

¹²⁸ Robert Frank, *Butler Gets Same Prison Sentence as His Boss*, WALL ST. J. (June 21, 2010, 11:23 AM), <https://www.wsj.com/articles/BL-WHB-3207> [<https://perma.cc/5ZUT-V76G>] Rodriguez died in 2015. Loulla-Mae Eleftheriou-Smith, *Prince Andrew Sex Allegations: Jeffrey Epstein's Butler Alfredo Rodriguez, Who Stole Tell-all 'Black Book', Dies Age 60*, INDEPENDENT (Jan. 7, 2015, 12:09 AM), <https://www.independent.co.uk/news/people/prince-andrew-sex-allegations-jeffrey-epstein-s-butler-alfredo-rodriguez-who-stole-tell-all-black-book-dies-age-60-9962307.html> [<https://perma.cc/4HJ9-2S82>].

¹²⁹ *How a Future Trump Cabinet Member*, *supra* note 7.

¹³⁰ Jane Musgrave, *Epstein Granted Work-Release Despite Ban on Sex Offenders*, PALM BEACH POST (July 17, 2019, 9:10 PM), <https://www.palmbeachpost.com/story/news/crime/2019/07/17/jeffrey-epstein-financier-given-work-release-despite-ban-on-sex->

leave the jail for twelve hours six days a week. His chauffeur picked him up and drove him to his luxurious West Palm Beach office.¹³¹ In defending Epstein's preferential treatment, Epstein's probation officer stated that it was fine for Epstein to walk around the beach when he was supposed to be at work because he was allowed to exercise.¹³²

In 2019, the Governor of Florida called for an investigation of Epstein's sentence, particularly how a convicted child molester was allowed work release without any supervision.¹³³ One of Epstein's victims, identified as Kaitlyn Doe, alleges that she "was coerced into performing sex acts with" Epstein and another woman in his office during the time plainclothes members of the Palm Beach Sheriff's Office were providing "security" to Epstein.¹³⁴ Allegedly, Epstein was allowed to hire the deputies, paying them to escort him to and from jail.¹³⁵

In 2009, Epstein was released from "jail" five months early and allowed to return to his Palm Beach Estate.¹³⁶ Although the terms of his probation prohibited travel, he regularly traveled between Florida, Manhattan, and his private island in the Virgin Islands.¹³⁷ Normally, probation violations result in new criminal charges and possible reincarceration, but Epstein continued

offenders/4660657007/ [https://perma.cc/3VDJ-8K4M] [hereinafter *Epstein Granted Work-Release*].

¹³¹ *Id.*; Jane Musgrave, *DeSantis Orders Probe into PBC's Handling of Jeffrey Epstein*, PALM BEACH POST (Aug. 8, 2019, 12:01 AM), <https://www.palmbeachpost.com/news/20190808/desantis-orders-probe-into-pbcersquos-handling-of-jeffrey-epstein> [https://perma.cc/4PMU-TVRRP].

¹³² Michele Dargan, *Jeffrey Epstein House Arrest Missteps Not Deemed Uncompliant*, PALM BEACH DAILY NEWS (Apr. 1, 2012, 7:59 AM), <https://www.palmbeachdailynews.com/story/news/2012/04/01/jeffrey-epstein-house-arrest-missteps/9629975007> [https://perma.cc/4W36-YYUX] ("At Officer Sloan's discretion, he was walking to work as his exercise, as he was not allowed to swim or go to the gym.").

¹³³ *He Thought He Was Untouchable*, *supra* note 3. Florida Gov. Ron DeSantis has ordered an investigation into whether the sheriff's deputies and others in the jail broke any laws in providing Epstein preferential treatment. *Id.* Julie K. Brown, *Florida Governor Orders State Criminal Probe into Jeffrey Epstein Case*, MIA. HERALD (Aug. 6, 2019, 2:51 PM), <https://www.miamiherald.com/news/state/florida/article233582872.html> [https://perma.cc/9CJY-A6ZQ].

¹³⁴ Matt Stieb, *Lawsuits Allege Epstein Arranged for Sex with Teenager While on Work Release*, N.Y. MAG. (Aug. 20, 2019), <https://nymag.com/intelligencer/2019/08/epstein-trafficked-teenager-while-on-work-release-lawsuit.html> [https://perma.cc/6PHF-QQ97].

¹³⁵ *He Thought He Was Untouchable*, *supra* note 3.

¹³⁶ *Epstein Granted Work-Release*, *supra* note 130.

¹³⁷ Christine Stapleton, *Jail Records Show Sex Offender Jeffrey Epstein Got Special Treatment*, PALM BEACH POST (July 21, 2019, 2:55 PM), <https://www.palmbeachpost.com/news/20190719/jeffrey-epstein-jail-records-show-sex-offender-got-special-treatment> [https://perma.cc/QMF2-TZXXN].

life unfettered.¹³⁸ Additionally, Epstein failed to register as a sex offender, which for other defendants would lead to new charges, probation violations, and reincarceration.¹³⁹ Unsurprisingly, no such consequences befell Epstein.

In 2011, Epstein petitioned to have his sex offender status reduced in New York City, where he was required to register every ninety days.¹⁴⁰ Because of his high risk of reoffending, United States Attorney for the Southern District of New York Geoffrey S. Berman classified Epstein as a Level 3 offender, the highest safety risk.¹⁴¹ Jennifer Gaffney, an Assistant District Attorney (ADA) under New York County District Attorney Cyrus Vance, lobbied on Epstein's behalf to reduce Epstein's offender status.¹⁴² Instead of prosecuting Epstein, ADA Gaffney defended Epstein and argued before New York Supreme Court Judge Ruth Pickholtz that the Florida case had not resulted in an indictment and that his underage victims failed to cooperate in the investigation.¹⁴³

Pickholtz rejected Epstein's petition, astonished by ADA Gaffney's defense of a pedophile.¹⁴⁴ Commenting on the prosecutor's abdication of her role, Judge Pickholtz stated, "I have to tell you, I'm a little overwhelmed because I have never seen a prosecutor's office do anything like this. I have done so many [sex offender registration hearings] much less troubling than this one where the [prosecutor] would never make a downward argument like this."¹⁴⁵ In response to outcry over Gaffney's defense of a child predator, Vance's office claimed that she had committed a rookie mistake and that Vance was unaware of the hearing to reduce Epstein's sex offender classification.¹⁴⁶

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *How a Future Trump Cabinet Member*, *supra* note 7; see also Robles et al., *supra* note 40.

¹⁴¹ *Timeline of the Life and Crimes of Jeffrey Epstein*, *supra* note 67.

¹⁴² Jan Ransom, *Cyrus Vance's Office Sought Reduced Sex-Offender Status for Epstein*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/nyregion/cyrus-vance-epstein.html> [<https://perma.cc/4C3K-9Z8E>] (ADA Gaffney asked that his status be lowered to the lowest possible sex offender status).

¹⁴³ *Id.*

¹⁴⁴ *How a Future Trump Cabinet Member*, *supra* note 7.

¹⁴⁵ *Id.*

¹⁴⁶ Ransom, *supra* note 142.

In 2011 and 2012, Epstein donated millions of dollars to Harvard and MIT to rehabilitate his pedophilic image.¹⁴⁷ In 2012, however, Virginia Roberts derailed Epstein's effort when she alleged that Epstein forced her to have sex with both Alan Dershowitz and Prince Andrew.¹⁴⁸ Both vehemently denied the allegations. In June 2016, Katie Johnson alleged that then-President Trump had raped her at a party at Epstein's New York City mansion in 1994, when she was thirteen.¹⁴⁹ Both Trump and Epstein vigorously denied the allegation and Johnson's claims disappeared.¹⁵⁰ Eventually, Johnson dropped her lawsuit because she had been threatened.¹⁵¹ Shortly after his inauguration, Trump nominated Acosta as Labor Secretary, a position that placed him over the nation's labor laws, including those involving human trafficking.¹⁵²

On November 28, 2018, in the wake of "fake news" and the #MeToo movement, journalist Julie Brown exposed the Epstein debacle in a Miami

¹⁴⁷ Tiffany Hsu et al., *Jeffrey Epstein Gave \$850,000 to M.I.T., and Administrators Knew*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/10/business/mit-jeffrey-epstein-join.html> [<https://perma.cc/L6LW-49PE>]; Steve Bradt, *MIT Releases Results of Fact-Finding on Engagements with Jeffrey Epstein*, MIT NEWS (Jan. 10, 2020), <https://news.mit.edu/2020/mit-releases-results-fact-finding-report-jeffrey-epstein-0110> [<https://perma.cc/Z35R-9KPT>]; Nirvi Shah, *Harvard Review Shows Jeffrey Epstein's Deep Ties and Big Donations*, POLITICO (May 1, 2020, 8:02 PM), <https://www.politico.com/news/2020/05/01/harvard-review-jeffrey-epstein-deep-ties-229693> [<https://perma.cc/XWU7-8WHL>]; Press Release, Harvard University, *Report Regarding Jeffrey Epstein's Connections to Harvard* (May 1, 2020) <https://www.harvard.edu/president/news/2020/report-regarding-jeffrey-epstein-connections-to-harvard> [<https://perma.cc/DEU2-ZFKW>].

¹⁴⁸ *Alan Dershowitz Sued in Prince Andrew Sex Abuse Case*, BBC NEWS (Jan. 7, 2015), <https://www.bbc.com/news/world-us-canada-30708795> [<https://perma.cc/W5J4-DHHX>] ("Ms. Roberts claims she was forced to have sex with the prince on three occasions . . . when she was under age.").

¹⁴⁹ *Complaint, Jane Doe v. Donald J. Trump and Jeffrey Epstein*, No. 1:16-cv-04642, at 2 (S.D.N.Y. 2016), available at <https://www.politico.com/f/?id=00000158-26b6-dda3-afd8-b6fe46f40000> [<https://perma.cc/TZ65-CYPH>]; see also Ruthann Robson, *The Sexual Misconduct of Donald J. Trump: Toward a Misogyny Report*, 27 MICH. J. GENDER & L. 81, 126 (2020).

¹⁵⁰ Josh Gerstein, *Woman Suing Trump over Alleged Teen Rape Drops Suit, Again*, POLITICO (Nov. 4, 2016, 10:04 PM), <https://www.politico.com/story/2016/11/donald-trump-rape-lawsuit-dropped-230770> [<https://perma.cc/52CY-FVN4>] (Trump denied the allegations through his attorney: "It is categorically untrue. It is completely frivolous. It is baseless. It is irresponsible.").

¹⁵¹ Emily Crockett, *The Lawsuit Accusing Trump of Raping a 13-Year-Old-Girl, Explained*, VOX (Nov. 3, 2016, 2:40 PM), <https://www.vox.com/policy-and-politics/2016/11/3/13501364/trump-rape-13-year-old-lawsuit-katie-johnson-allegation> [<https://perma.cc/3UJD-FGVM>] (Lisa Bloom, attorney for Katie Johnson, stated that "Johnson was afraid to show her face after receiving multiple death threats."); see also *Notice of Voluntary Dismissal, Jane Doe v. Donald J. Trump and Jeffrey Epstein*, No. 1:16-cv-04642 (S.D.N.Y. 2016), available at <https://www.politico.com/f/?id=00000158-318d-d416-abfeb-bdf51aa0001> [<https://perma.cc/3JWD-RGEB>].

¹⁵² *How a Future Trump Cabinet Member, supra* note 7.

Herald article entitled, “How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime.”¹⁵³ Describing the zeitgeist of political activism surrounding sexualized violence in the #MeToo movement, Brown poignantly wrote, “at a time when Olympic gymnasts and Hollywood actresses have become a catalyst for a cultural reckoning about sexual abuse, Epstein’s victims have all but been forgotten.”¹⁵⁴ A year after Brown published her story, Acosta was eliminated as a possible replacement for Attorney General Jeff Sessions.¹⁵⁵

On July 6, 2019, the United States Attorney’s Office for the Southern District of New York charged Epstein with sex trafficking girls as young as fourteen.¹⁵⁶ A search of Epstein’s Manhattan mansion revealed hundreds of sexually suggestive images of underage girls.¹⁵⁷ The public learned that the Southern District of Florida United States Attorney’s Office, under Acosta, had investigated and released Epstein from federal prosecution for the identical conduct fifteen years earlier.¹⁵⁸ The statute of limitations for sexualized violence was originally five years, but before Epstein’s statute of limitations had run, lawmakers changed the limitations period, which allowed for Epstein’s prosecution.¹⁵⁹ On July 12, 2019, Acosta resigned as Labor

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Press Release, U.S. Dep’t of Just., U.S. Att’y Off., S.D.N.Y., Jeffrey Epstein Charged in Manhattan Federal Court With Sex Trafficking Of Minors (July 8, 2019), <https://www.justice.gov/usao-sdny/pr/jeffrey-epstein-charged-manhattan-federal-court-sex-trafficking-minors> [<https://perma.cc/ESQ3-8W27>] [hereinafter Press Release: Epstein Charged].

¹⁵⁷ Ali Watkins, *Jeffrey Epstein Is Indicted on Sex Charges as Discovery of Nude Photos Is Disclosed*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/nyregion/jeffrey-epstein-charges.html> [<https://perma.cc/FUY6-FTSU>].

¹⁵⁸ *See Cops Worked to Put Serial Sex Abuser in Prison*, *supra* note 37 (“In 2007, despite ample physical evidence and multiple witnesses corroborating the girls’ stories, federal prosecutors and Epstein’s lawyers quietly put together a remarkable deal for Epstein, then 54. He agreed to plead guilty to two felony prostitution charges in state court, and in exchange, he and his accomplices received immunity from federal sex trafficking charges that could have sent him to prison for life. He served [thirteen] months in a private wing of the Palm Beach County Stockade.”).

¹⁵⁹ *See Emanuella Grinberg*, *New York Just Changed Its Statute of Limitations. Here’s How It Could Help Jeffrey Epstein’s Accusers*, CNN (July 8, 2019, 11:55 PM), <https://www.cnn.com/2019/07/08/us/new-york-child-victims-act/index.html> [<https://perma.cc/G6TV-BU39>] (In July 2019, the New York State Legislature passed the Child Victims Act, which expands the statute of limitations in child sex abuse cases, giving survivors of child sexual assault cases the right to pursue criminal felony charges until they turn 28 and the right to file a civil lawsuit before age 55.).

Secretary.¹⁶⁰ On August 10, 2019, less than a month after his arrest, Epstein was found hanging in his cell from an alleged suicide.¹⁶¹

II. THE LEGAL ARGUMENTS: EPSTEIN RAN A SEX TRAFFICKING RING FILLED WITH UNDERAGE GIRLS

The full extent of the evidence against Jeffrey Epstein and how that evidence would have played out during adjudication will never be known. The investigations pending against Epstein were smothered early, first by prosecutorial discretion and then by Epstein's alleged suicide. Nevertheless, to examine Acosta's conduct, it is necessary to understand federal sex trafficking laws. This section outlines the primary sex trafficking statute in the federal arsenal of charges and applies the statute to reported evidence that was pending against Epstein. In addition, this section looks at possible defenses Epstein might have raised and those his defense attorneys made during their negotiations with state and federal prosecutors. Lastly, this section demonstrates how prosecutors could have handled the case against Epstein and how easy federal laws make it to prosecute defendants, further highlighting the highly problematic decision of Acosta to decline prosecution.

A. Evidence That Satisfies the Main Federal Sex Trafficking Statute

The main federal sex trafficking statute is 18 U.S.C. § 1591 of the Trafficking Victims Protection Reauthorization Act of 2000. Section 1591 sets out the following elements:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is

¹⁶⁰ Kevin Breuninger & Valeria Block, *Trump Labor Secretary Alex Acosta Resigns Amid Pressure from Jeffrey Epstein Sex Traffic Case*, CNBC (July 12, 2019, 1:13 PM), <https://www.cnbc.com/2019/07/12/labor-secretary-alex-acosta-is-resigning-as-pressure-mounts-from-jeffrey-epstein-case.html> [<https://perma.cc/NE9U-P2RC>].

¹⁶¹ William K. Rashbaum et al., *Jeffrey Epstein Dead in Suicide at Jail, Spurring Inquiries*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/nyregion/jeffrey-epstein-suicide.html> [<https://perma.cc/XT7J-CGCQ>].

advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of [eighteen] years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).¹⁶²

Section 1591 criminalizes two forms of sex trafficking: (1) sex trafficking children and (2) sex trafficking adults. Sex trafficking adults, unlike children, requires proof of force, threats of force, fraud, or coercion.¹⁶³ Federal law does not recognize a child prostitute because minors cannot consent to sex.¹⁶⁴

Section 1591 sets out three basic elements: (1) the defendant acts in the furtherance of or benefits from a commercial sex act; (2) the defendant possesses the requisite mens rea; and (3) the defendant engaged in interstate commerce.¹⁶⁵ The term “commercial sex act” is defined as any sex act for which anything of value is given or received by any person.¹⁶⁶ Thus, paying money to sex trafficking victims would constitute “a thing of value.” Exchanging property or planes for sex with victims is also sex trafficking within the meaning of § 1591.¹⁶⁷ Exchanging sex with victims for immunity from criminal prosecution might also constitute “a thing of value.”¹⁶⁸

¹⁶² 18 U.S.C. § 1591(a) (2018).

¹⁶³ *See id.* § 1591(a).

¹⁶⁴ *United States v. Elbert*, 561 F.3d 771, 776 (8th Cir. 2009) (citing Fed. R. Evid. 412(b)(1)(B) and finding that minor victims cannot legally consent). Human rights attorney Yasmin Vafa stated that “there is no such thing as a child prostitute” and continued that “under federal law, it’s called child sex trafficking” whether Epstein pimped them out to others or not. It’s still a commercial sex act—and he could have been jailed for the rest of his life under federal law. Leonard Pitts, “*There is No Such Thing as a Child Prostitute*”, SALT LAKE TRIBUNE (Dec. 2, 2018, 7:00 AM), <https://www.sltrib.com/opinion/commentary/2018/12/02/leonard-pitts-there-is-no> [https://perma.cc/28B9-BEWC].

¹⁶⁵ 18 U.S.C. § 1591 (2018).

¹⁶⁶ *Id.* § 1591(e)(3).

¹⁶⁷ *United States v. Horn*, 187 F.3d 781, 791 (8th Cir. 1999) (quoting *May v. Sloan*, 101 U.S. 231, 237 (1879)) (citing *traffic*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1986) (“traffic” is “the activity of exchanging commodities by bartering or buying and selling”) (“‘Traffic,’ like ‘trade,’ includes both ‘the business of buying and selling for money’ and ‘the business of exchanging commodities by barter. . . .’”); *see also* *United States v. Jungers*, 702 F.3d 1066, 1072 (8th Cir. 2013) (holding that 18 U.S.C. § 1591 can apply to buyers of sex).

¹⁶⁸ *Noble v. Weinstein*, 335 F. Supp. 3d 504, 521 (S.D.N.Y. 2018) (“Even if the prospect of a film role, of a modeling meeting, and of a continued professional relationship with [The Weinstein Company] were not ‘things of value’ sufficient to satisfy commercial aspect of the sex act definition, Noble’s reasonable expectation of receiving those things in the future, based

Promised contracts also constitute “a thing of value.”¹⁶⁹ Making promises to help girls was part of Epstein’s modus operandi. As argued *supra*, Alicia Arden, an aspiring model, alleged that Epstein promised her a modeling contract with Victoria’s Secrets.¹⁷⁰ Maria Farmer alleged that Epstein promised he would promote her art among his circle of wealthy elites.¹⁷¹ Chantae Davies was suffering from a neurological disorder that Epstein promised to aid.¹⁷² A young violinist whose mother died when she was eleven and whose father was too incapacitated with grief to care for her was approached by a woman who saw her in a secondhand clothing store and promised her that she knew a very rich man who could “help her and send her to school.”¹⁷³ All of these promises constitute “a thing of value” within the meaning of § 1591.¹⁷⁴

Section 1591 criminalizes a wide range of conduct, including being involved in, or benefiting from, sex trafficking. That category includes the women, like Ghislaine Maxwell, Epstein’s girlfriend, who recruited minors

on Harvey’s repeated representations that she would, is sufficient. [] *See also* United States v. Corley, 679 F. App’x 1, 7 (2d Cir. 2017) (summary order) (recognizing that Section 1591 ‘does not require that an actual commercial sex act have occurred.’); *see also* United States v. Cook, 782 F.3d 983, 989–90 (8th Cir. 2015) (“A person of ordinary intelligence would reasonably understand that sexual acts, photographs, and videos—which are items that many people spend significant time, money, and effort pursuing and acquiring—could constitute ‘things of value.’ A person of ordinary intelligence would also reasonably understand that acquiring those items through participation in a commercial sex trafficking venture could result in criminal culpability.”).

¹⁶⁹ 18 U.S.C. § 1591(e)(3) (2018); *see also* United States v. Raniere, No. 20-3520, 2022 U.S. App. LEXIS 33910 (2d Cir. Dec. 9, 2022) (“[T]o qualify as ‘commercial sex act’ for purposes of this provision, thing of value given or received need not have monetary or financial component and thus for sexual exploitation to be actionable under this provision, it need not have been conducted for profit.”); Noble v. Weinstein, 335 F. Supp. 3d 504, 521 (S.D.N.Y. 2018) (“Congress’s use of expansive language in defining commercial sex act—using such terms as ‘any sex act,’ ‘anything of value,’ ‘given to or received by any person’—requires a liberal reading.”); United States v. Maneri, 353 F.3d 165, 168 (2d Cir. 2003) (defining ‘thing of value’ in the context of 18 U.S.C. § 2252’s sentencing guidelines to include intangibles).

¹⁷⁰ Steel et al., *supra* note 31.

¹⁷¹ *Id.*

¹⁷² Renae Merle & Deanna Paul, *I Will Not Be Silenced: Epstein May Have Avoided Justice, But His Alleged Victims Spoke Loudly in Court*, WASH. POST (Aug. 27, 2019, 8:33 PM), <https://www.washingtonpost.com/national-security/2019/08/27/i-will-not-be-silenced-epstein-may-have-avoided-justice-his-victims-spoke-loudly-court> [https://perma.cc/2KZD-93M5].

¹⁷³ *He Thought He Was Untouchable*, *supra* note 3.

¹⁷⁴ *Id.*; 8 U.S.C. § 1591(e)(3) (2018).

for Epstein's sexual pleasure;¹⁷⁵ the women who devised "the playbook" for how to lure minors into Epstein's web by telling recruiters to target young, financially desperate girls, and to promise them help that would further their education and their career;¹⁷⁶ the women who arranged and scheduled victims for Epstein to rape;¹⁷⁷ the women who partook in the sexual assault of victims along with Epstein, for example the women who arrived unclothed during Epstein's massages on whom Epstein directed a minor to perform oral sex;¹⁷⁸ the women who groomed and trained Epstein's victims on how to pleasure him sexually;¹⁷⁹ the persons who knowingly transported victims to Epstein or arranged transportation for them to Epstein or any of Epstein's associates, for example private drivers or airplane pilots who took victims to Epstein's private island, Little Saint James, for Epstein to rape;¹⁸⁰ the persons who paid the victims; anyone who harbored a victim for Epstein or arranged for the

¹⁷⁵ Epstein's victims have accused Ghislaine Maxwell, the daughter of the publishing magnate Robert Maxwell, of being in charge of efforts to recruit girls and young women for Epstein. She denies these claims. Maxwell, Epstein's onetime girlfriend, "managed recruiters and helped create a playbook for procuring girls, the accusers contend in court papers. Recruiters were to target young women who were financially desperate and promise them help in advancing their studies and careers." Andrea Salcedo, *Jeffrey Epstein: The Women Accused of Finding Girls for Him*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/nyregion/jeffrey-epstein-women.html> [<https://perma.cc/F6U6-8KSM>].

¹⁷⁶ Harris et al., *supra* note 70.

¹⁷⁷ Salcedo, *supra* note 175 (explaining that "[a] woman named Sarah Kellen reported to Ms. Maxwell, and one of her responsibilities, lawyers for the accusers said, was to schedule sex for Mr. Epstein. Ms. Kellen kept the names and numbers of girls and young women who gave Mr. Epstein massages, according to police records and lawsuits. Whenever Mr. Epstein was in Palm Beach, she called girls and young women to ask if they could "work."").

¹⁷⁸ *Id.* (explaining that "Nadia Marcinkova was a former model who arranged and took part in sexual acts with at least one underage girl, according to police records. She may have been a victim herself, police records indicate."); Harris et al., *supra* note 70 ("A 16-year-old told detectives she was giving Mr. Epstein a massage when Ms. Marcinkova entered the room naked, according to Palm Beach police reports. Mr. Epstein then told the girl she could make an extra \$200 if she performed oral sex on Ms. Marcinkova, and the girl reluctantly agreed, the reports said."). The details of Epstein's conduct are not provided here to satisfy prurient interests; rather, they are provided to underscore the heinousness of Epstein's acts and the outrageousness of prosecutors' conduct.

¹⁷⁹ Harris et al., *supra* note 70. But Mr. Epstein is also accused in civil suits of relying on an organized network of underlings: those who trained girls how to sexually pleasure him, office assistants who booked cars and travel, and recruiters who ensured he always had a fresh supply of teenage girls at the ready. *Id.*; Edward Helmore, *Maxwell Conviction Increases Scrutiny of Other Women Who Worked for Epstein*, GUARDIAN (Dec. 31, 2021), <https://www.theguardian.com/us-news/2021/dec/31/ghislaine-maxwell-conviction-increases-scrutiny-epstein-employees> [<https://perma.cc/9CTE-CNK8>].

¹⁸⁰ Salcedo, *supra* note 175; *He Thought He Was Untouchable*, *supra* note 3 (stating that Chauntae Davies was taken to Epstein's private island, Little St. James, when she was young, where, she said, he raped her).

“fresh supply” of girls that were always available to Epstein;¹⁸¹ and persons who engaged in the rape of a minor or sex with Epstein’s adult victims in exchange for a thing of value, for example money, property, planes, or protection from prosecution.¹⁸²

Section 1591 applies to suppliers, consumers, and purchasers of commercial sex.¹⁸³ Thus, Epstein’s actions of molesting minors himself and offering his minor victims to others for sexual molestation in exchange for something of value are all punishable under section 1591. Obtaining a person for the purpose of a commercial sex act includes the actions of a purchaser whose sole purpose is obtaining a child for sex.¹⁸⁴ Moreover, § 1591 is not limited to large-scale sex trafficking organizations.¹⁸⁵ It criminalizes the gamut of sex trafficking operations, from the large-scale operations of criminal organizations to individual acts of trafficking.¹⁸⁶ Epstein’s involvement with sex trafficking was so comprehensive that Acosta could have charged him both individually and as part of a larger organization along with his accomplices and co-conspirators.

B. There Was No Legal Reason for Acosta to Agree to the Terms of Epstein’s Team

In the mid-twentieth century, galvanized by the War on Drugs, the Supreme Court erected enormous structural advantages for the prosecution in criminal cases.¹⁸⁷ These include a non-adversarial grand jury procedure that

¹⁸¹ Harris et al., *supra* note 70.

¹⁸² “Recruit” means to seek the services of a person. “Entice” means to attract or lure using hope or desire. “Harbor” means to give or afford shelter or refuge to a person, either openly or secretly. “Transport” means to transfer or convey from one place to another. “Provide” means to supply or make available. And “obtain” means to gain, acquire, or attain. Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1032 (2013) (citing Jury Instructions at 11, United States v. Yarbrough, No. 10-20283-STA (W.D. Tenn. 2012), ECF No. 244); United States v. Jungers, 702 F.3d 1066, 1070 (8th Cir. 2013) (citing United States v. Culbert, 98 S. Ct. 1112, 1113 (1978)).

¹⁸³ *Jungers*, 702 F.3d at 1075; United States v. Cook, 782 F.3d 983, 987 (8th Cir. 2015).

¹⁸⁴ 22 U.S.C. § 7102(9) (2021) (emphasis added); *Jungers*, 702 F.3d at 1072.

¹⁸⁵ *Jungers*, 702 F.3d at 1071.

¹⁸⁶ Section 1591(a)(2) provides criminal sanctions for any trafficker who benefits “financially or by receiving anything of value, from participation” in a trafficking “venture”—defined as “any group of two or more individuals associated in fact.” 18 U.S.C. § 1591(e)(5) (2018); *Jungers*, 702 F.3d at 1071.

¹⁸⁷ Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. CRIMINOLOGY 717, 718 (1995); see also Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 586 (2016)

does not grant the accused a constitutional right to testify or have exculpatory evidence presented; statutes that allow prosecutors to withhold potentially exculpatory information from defendants throughout the plea-bargaining process pursuant to the Jencks Act;¹⁸⁸ and Federal Rules of Evidence that allow prosecutors to enter prior convictions into evidence should the accused decide to take the stand at trial.¹⁸⁹ The Supreme Court has imposed no limits on a prosecutor's ability to pressure defendants into pleading.¹⁹⁰ In 1978, in *Bordenkircher v. Hayes*, the Court ruled as constitutional a prosecutor's threat to expose a defendant to a mandatory life sentence if he failed to take a five-year plea for passing a false check in the amount of \$88.30.¹⁹¹ Similarly, in 1963, in *Brady v. Maryland*, the Court held that prosecutors do not need to disclose exculpatory information until, at, or near the time of trial, which places defendants at a distinct disadvantage in the plea-bargaining process.¹⁹² Acosta could have relied on all such structural advantages to convict Epstein.

1. Acosta Could Have Used His Charging Decisions to Control the Outcome

In addition to these advantages, Acosta had the mighty cudgel of the charging decision. Through their charging decisions, prosecutors largely control every aspect of the case.¹⁹³ The prosecutor's charging decision sets the parameters and scope of discovery, bail, relevant and admissible evidence, pleas, and sentencing.¹⁹⁴ Prosecutors have the unchecked, unfettered, and unreviewable authority to decide whether there will be a case, whether there will be a victim, who will be the victim, how many victims there will be, whether there will be one defendant or twenty, whether the grand jury will issue subpoenas, whether the defendant will have difficulty seeking bail, whether there will be a plea agreement and what the terms will be, whether

[hereinafter *Biased and Broken Bodies of Proof*] (discussing systemic racialized practices in investigations and grand jury proceedings regarding police force against black individuals).

¹⁸⁸ 18 U.S.C. § 3500 (2021).

¹⁸⁹ FED. R. EVID. 609.

¹⁹⁰ Capers, *supra* note 20, at 1594.

¹⁹¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 372 (1978); Capers, *supra* note 20, at 1594 (citing *Bordenkircher*, 434 U.S. at 363, which concluded that “in the ‘give-and-take’ of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”).

¹⁹² *Brady v. Maryland*, 373 U.S. 83, 90 (1963); Capers, *supra* note 20, at 1609.

¹⁹³ Angela J. Davis, *Meet the Criminal Justice System’s Most Powerful Actors*, THE APPEAL (May 29, 2018), <https://theappeal.org/meet-the-cj-systems-most-powerful-actors> [https://perma.cc/QE9Y-BPGJ] (“The power and discretion of prosecutors cannot be overstated.”).

¹⁹⁴ Capers, *supra* note 20, at 1569.

there will be a life sentence or the death penalty, and whether the counts charged against the defendant will rise to over 100 or fall to as few as one.¹⁹⁵

When prosecutors exercise their discretion to charge or to decline prosecution, few if any entities, including the courts, can rein in their muscle.¹⁹⁶ Prosecutors act as quasi-legislative bodies that decide who gets criminalized, what conduct gets criminalized, and in what way that conduct gets criminalized.¹⁹⁷ They wield the authority of the “police, prosecutor, magistrate, grand jury, petit jury, and judge in one.”¹⁹⁸ When making their charging decisions, the prosecutor is not required to reveal or justify their decision. Because prosecutors have unfettered charging discretion, they can pressure a defendant to accept a plea, if the evidence will support the charges, regardless of actual guilt or innocence. Prosecutors can dictate the terms of the plea agreement through their charging decisions.¹⁹⁹ As Adam Gershowitz

¹⁹⁵ U.S. Dep’t of Just., Just. Manual § 9-27.110 (2018); *Bordenkircher*, 434 U.S. at 365 (explaining that the breadth of discretion the legal system vests in prosecution attorneys carries the potential for “both individual and institutional abuse”); West’s Fed. Admin. Prac., *Administrative Law and Procedure* § 7758 (2021).

¹⁹⁶ Indeed, it is well settled that “the decision of whether or not to prosecute . . . is a decision firmly committed by the [C]onstitution to the executive branch of the government,” and any “intervention by the court in the internal affairs of the Justice Department would clearly constitute a violation of the Separation of Powers doctrine.” *United States v. Renfro*, 620 F.2d 569, 574 (6th Cir. 1980). Because of separation-of-powers mandates, courts cannot compel prosecutors to file charges. Capers, *supra* note 20, at 1570 (citing *State ex rel. Unnamed Petitioners v. Connors*, 401 N.W.2d 782 (Wis. 1987), which holds that a state statute that permitted courts to compel prosecution violated the separation-of-powers requirement of the constitution); *cf.* *Steen v. App. Div.*, Super. Ct., 331 P.3d 136 (Cal. 2014) (holding the statute does not allow the clerk to initiate criminal proceedings without the prosecutor’s approval). Despite the clear separation-of-powers issue, federal prosecutors are required to present a case to a grand jury unless the defendant elects to proceed by way of information. However, ninety percent of federal cases go to the grand jury and return with a true bill. MARK MOTIVANS, FEDERAL JUST. STATISTICS 2010–STATISTICAL TABLES, 11–12 (2013). Moreover, in exercising their decision to charge, prosecutors cannot act in a constitutionally discriminatory manner. *See Blackledge v. Perry*, 417 U.S. 21 (1974).

¹⁹⁷ India Geronimo, *Reasonably Predictable: The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures*, 33 FORDHAM URB. L.J. 101, 109 (2011) (discussing *United States v. Booker*, 543 U.S. 220 (2005) and the Court’s opinion that vast prosecutorial discretion “does not satisfy the Sentencing Commission goals of increasing uniformity”); *see also* Michael J. Slobom, *Introduction*, 123 DICK. L. REV. 587, 587 (2019) (“Recent events have produced public outcries against prosecutorial decisions to not charge the wealthy and powerful to overcharge and aggressively prosecute people of color, and to refuse to charge petty offenses. The major concerns underlying each of these outcries, whether well-founded or not, are that prosecutors have either weaponized their authority to an unlawful extreme or have completely abdicated their duties to seek justice.”).

¹⁹⁸ Capers, *supra* note 20, at 1569–70 (citing RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929)).

¹⁹⁹ Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STA. J. C.R. & C.L. 213, 220 (2016).

has pointed out, “No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”²⁰⁰

By way of explanation, the decision to charge initiates a process through which a suspect becomes a defendant and is subject to pre-plea or pre-conviction loss of liberty, lifetime stigma, and collateral consequences that may be more onerous than direct punishment.²⁰¹ Because a criminal charge or indictment inflicts serious harm on a defendant, because the prosecutor can leverage tremendous pressure on the defendant, and because the Supreme Court has fashioned tremendous structural advantages for prosecutors during the age of mass incarceration, the charging decision alone, as Kate Levine argues, is often the conviction.²⁰²

As an illustration of the power of prosecutors, DOJ chose to forgo charges against Darren Wilson, the officer who shot Michael Brown in Ferguson, Missouri. That decision is not reviewable, even after Wilson made allegations that Brown confronted him while he was in police uniform, armed, and seated in a clearly marked police vehicle and started pummeling him; paused his vicious attack against Wilson long enough to hand a package to his companion; reinitiated the assault on Wilson; and ran through six rounds of bullets while Wilson told him to halt three different times.²⁰³

²⁰⁰ Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 857 (2018).

²⁰¹ See generally A.B.A., *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, NCJRS (Mar. 2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/A2JW-3C7Z>] (discussing the social and economic barriers that arise when someone is criminally convicted); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 754 (2016) (discussing how criminal procedure treats police and other suspects differently).

²⁰² Levine, *supra* note 201, at 754.

²⁰³ The prosecutors in the Darren Wilson case allowed him to testify before the grand jury without questioning his testimony. During his testimony, Wilson testified that he told Brown to step back from his police vehicle three times, twice Brown responded by slamming the SUV door on Wilson and the third time, Brown assaulted him, “swinging wildly,” yet pausing briefly to hand a package to Dorian Johnson, his companion, and then continuing to punch the armed Wilson. *Biased and Broken Bodies of Proof*, *supra* note 187, at 608 (citing DEP’T OF JUST., THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 13 (2015)). Wilson went on to testify that he pulled his service weapon on Brown and Brown retorted that Wilson was “too much of a pussy” to shoot. DEP’T OF JUST., THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 13 (2015). Wilson claimed that after he shot at Brown from within his SUV, Brown, who “looked like a demon,” charged him again. *Id.* Wilson also testified that Brown continuously charged him after he had already fired four rounds and Brown had been hit by six bullets. *Id.*

Similarly, the lack of oversight, reviewability, and accountability of DOJ declinations extends to charges against the policeman who choked Eric Garner to death, despite overwhelming evidence, including a video in which he is seen using an illegal choke hold to kill Garner as he cried out that he could not breathe.²⁰⁴ Prosecutorial discretion also extends to prosecutors' failure to charge any executive in connection with the financial collapse of 2008 in an age of mass incarceration.²⁰⁵

As another example of prosecutorial power, and in stark contrast to the level of solicitous care Epstein received, the wife of a minister and her stepdaughter received sentences of two and four years respectively for threatening a fourteen-year-old witness in a sex trafficking ring involving three ministers and three victims.²⁰⁶ The ministers received sentences ranging

²⁰⁴ Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-daniel-pantaleo.html> [<https://perma.cc/3GT4-QHR6?type=standard>].

²⁰⁵ See generally Henry N. Pontell, *Too Big to Fail, Too Powerful to Jail? On The Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 CRIME L. & OTHER SOC. CHANGE 1, 1–13 (2014) (discussing why there have been no major prosecutions after the 2008 financial meltdown); BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014) (discussing how a different standard of justice is applied to corporations); see also William D. Cohan, *How Wallstreet's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368> [<https://perma.cc/3PFQ-XU72>]; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted*, N.Y. REV. BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> [<https://perma.cc/6M4J-5XF4>]; Jerry W. Markham, *Regulating the "Too Big to Jail" Financial Institutions*, 83 BROOK. L. REV. 517, 518–19 (2018) (noting that only lower-level officers and traders were prosecuted criminally, and that high-level executives were given immunity from prosecution); Nick Werle, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L. J. 1366 (2019). Paul Butler has also noted the irony in the failure to prosecute the officer who killed Eric Gardner and the executives who were immunized from prosecution during the financial crisis:

In the years leading up to the housing crisis in 2008, greedy mortgage bankers provided loans to poor people that were virtually guaranteed to fail. Investors who bet against the loans being repaid got very rich, but millions of Americans lost their homes, or had their retirement savings decimated, or became unemployed due to the tanked economy. One of President Obama's first major acts, upon his election, was to provide a \$700 billion rescue plan to the banks. But no one has gone to jail for behavior that devastated the lives of millions of Americans. Yet when Eric Garner sold a single tobacco cigarette on the streets of Staten Island, he was arrested and put into a chokehold.

PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 127 (2017).

²⁰⁶ *Wife of Minister Convicted of Sex Charges Sent to Prison*, ASSOCIATED PRESS (May 20, 2020), <https://apnews.com/article/529c8629741377a9eab3dad8d857a138> [<https://perma.cc/75ZX-CXWF>].

from life to 210 months. All the victims and defendants were Black.²⁰⁷ As will be argued in Part III, when defendants are Black, prosecutors experience clarity of mind, know what to do, and know how to unleash the full power of their function.

The power prosecutors wield in the grand jury is equally staggering. The prosecutor alone decides how much or little evidence will be presented to the grand jury, whether the grand jury will seek subpoenas for additional evidence, and what charges the grand jury will hear. The defendant has no constitutional right to appear before the grand jury, let alone with a lawyer. As a measure of how much power prosecutors have with grand juries, in 2010, federal prosecutors prosecuted 162,000 cases, out of which the grand jury declined to indict eleven times.²⁰⁸ This kind of success rate prompted Sol Wachtler, a former chief judge of the highest New York court, to remark that prosecutors can “get a grand jury to indict a ham sandwich.”²⁰⁹ Approximately ninety percent of cases end in a plea agreement.²¹⁰

²⁰⁷ Camryn Justice, *Ohio Pastor Sentenced to Life in Prison for Sex Trafficking of a Minor*, NEWS 5 CLEV. (May 17, 2019, 7:19 PM), <https://www.news5cleveland.com/news/state/ohio-pastor-sentenced-to-life-in-prison-for-sex-trafficking-of-a-minor> [<https://perma.cc/AM7R-DCAL>]. As for the capitalization of “Black” throughout this piece, I state the following: The naming of persons of color, including Blacks and Latinas/os, remains highly contested ground, with marginalized groups demanding the authority to self-define, self-proclaim, and self-announce. Thus, it is imperative for me to make several comments concerning the utility of the words ‘black,’ ‘Black,’ and African-American. When used as an adjective, I use “black” and similarly “white.” I use ‘African-American’ and ‘Black’ interchangeably. When using ‘Black’ I capitalize it to reflect the view that Blacks, like Asian Americans, Latina/os, and other ‘underrepresented groups,’ constitute specific ethnic and cultural groups. Consequently, this requires the designation of a proper noun. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349 (1988); Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 J. WOMEN CULTURE & SOC’Y 515, 516 (1982) (noting that ‘Black’ is more than skin color or pigmentation, but as a cultural heritage, a shared experience, a personal and communal identity, the meaning of which has been deemed synonymous with social stigma); *Biased and Broken Bodies of Proof*, *supra* note 187, at 569 n.6.

²⁰⁸ Ben Cassel, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson> [<https://perma.cc/TF74-2QHZ>]; Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUM. L. SCH.: NEWS (Dec. 5, 2014), <https://www.law.columbia.edu/news/archive/professors-fagan-and-harcourt-provide-facts-grand-jury-practice-light-ferguson-decision> [<https://perma.cc/QEM7-S566>].

²⁰⁹ Sam Howe Verhovek, *Wachtler’s Reversal of Fortune; Fallout from Chief Judge’s Arrest Likely to Extend to Courts*, N.Y. TIMES (Nov. 9, 1992), <http://www.nytimes.com/1992/11/09/nyregion/wachtler-s-reversal-fortune-fallout-chief-judge-s-arrest-likely-extend-courts.html> [<https://perma.cc/VBX8-JU98>].

²¹⁰ LINDSEY DEVERS, U.S. DEP’T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>

Consequently, the prevailing standard for conviction is not proof beyond a reasonable doubt, which applies at trial, but rather probable cause, which is the burden of proof to indict.²¹¹

Prosecutors can threaten to increase charges, and they have the constitutional right to enact such threats.²¹² They can overcharge, both horizontally—by filing several different charges arising out of the same offense, and vertically—by charging a suspect with more serious crimes than the evidence establishes.²¹³ They can ratchet up the amount and severity of charges to ensure a swift conviction without expending the resources necessary for trial and without verifying the evidence police present.²¹⁴ In a typical case, the prosecutor can present just one witness to the grand jury to satisfy the probable cause standard.²¹⁵

Compounding the power prosecutors exercise with grand juries and during the plea negotiations, prosecutors can leverage the charging decision to make bail unattainable for the defendant. When the evidence supports the charges, prosecutors can charge a defendant with the most severe charges, making it improbable that a defendant will receive bail. If a defendant loses a bail hearing, the additional burden of pretrial incarceration adds more pressure to accept a plea, e.g. the social stigma of incarceration, the loss of income or employment, the pressures of pretrial incarceration, the inability to fraternize with friends and family, and the inability to participate fully in their own defense.²¹⁶ In *Epstein*, the prosecution could have charged Epstein with child sex trafficking based on the testimony of any one—or all—of the witnesses. Moreover, child sex trafficking statutorily provides a presumption of detention before trial.²¹⁷

[<https://perma.cc/JU6C-D22S>] (“While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”).

²¹¹ See generally William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (Mar. 2016) (discussing the burden of proof to indict).

²¹² See DEVERS, *supra* note 210, at 1; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see generally *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding that increased punishment after an appeal violates a defendant’s due process where it likely results from vindictiveness).

²¹³ Levine, *supra* note 201, at 758.

²¹⁴ *Id.*

²¹⁵ Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 828–29 (2015).

²¹⁶ NYCLA Just. Ctr. Task Force, *Solving the Problem of Innocent People Pleading Guilty*, 40 PACE L. REV. 1, 7 (2020); see also John H. Blume & Rebecca J. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 175 (2014).

²¹⁷ 18 U.S.C. § 3142(e)(3).

Acosta could also have used charging pressures to flip Epstein's accomplices. Prosecutors routinely threaten low-level accomplices with increased charges or conspiracy charges to pressure them to cooperate in the government's prosecution. Cooperation includes providing evidence and testimony that prosecutors can use to move up the hierarchy of a criminal enterprise.²¹⁸ Using underlings to spread liability upstream is standard practice in prosecutions.²¹⁹ Prosecutors can, and often do, issue arrest warrants and threaten witnesses who refuse to cooperate with obstruction charges.²²⁰ In addition, an obstruction conviction under §1591 alone requires defendants to register as sex offenders.²²¹

Furthermore, in making choices about how to prosecute and who to prosecute, prosecutors exercise a tremendous amount of discretion in executing their functions. Prosecutors can choose to decline charges where they believe that doing so would better serve the interests of justice.²²² Likewise, prosecutors may elect to pursue harsh sentences against individuals they perceive to be unremorseful or a threat to public safety.²²³ This discretion may allow for leniency in some cases, but it often contributes to racial disparities.²²⁴

²¹⁸ Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 346, 399 (2003) (“[C]onspiracy liability can serve as an information-forcing tool. Conspiracy law makes it possible for prosecutors to threaten low-level conspirators with severe sentences and then offer them reductions in exchange for inculpatory evidence about higher-level conspirators.”).

²¹⁹ Levine, *supra* note 201, at 757.

²²⁰ Prosecutors can also hold a recalcitrant witness in contempt if they refuse to cooperate after immunization under 28 U.S.C. § 1826. *See* 28 U.S.C. § 1826 (giving the court the authority to confine a recalcitrant witness until the witness agrees to cooperate; confinement cannot exceed eighteen months); Russell Dean Covey, *Beating the Prisoner at Prisoner's Dilemma: The Evidentiary Value of a Witness's Refusal to Testify*, 47 AM. U. L. REV. 105, 108 (1997).

²²¹ Blanche Cook, *Complicit Bias: Sex-Offender Registration as a Penalty for Obstructing Sex Trafficking Prosecutions*, 96 NEB. L. REV. 138, 140 (2017) [hereinafter *Complicit Bias*].

²²² *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1660 (2010).

²²³ *Id.*

²²⁴ *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018) (“[W]hite defendants are over twenty-five percent more likely than black defendants to see their top charge dropped or reduced than black defendants.”); Amber Hall, Note, *Using Legal Ethics to Improve Implicit Bias in Prosecutorial Discretion*, 42 J. LEGAL PROF. 111, 120 (2017) (“Prosecutors are less likely to charge Caucasian suspects than African-American suspects regardless of criminal record.”); Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473, 483 (2019) (“With ‘real criminality’ fastened to blackness, prosecutors and judges are more likely to ‘divert’ whites into drug courts, pretrial diversion, or other programming.”); Christina Morris, Note, *The Corrective Value of Prosecutorial Discretion: Reducing Racial Bias through Screening, Compassion, and Education*, 31 B.U. PUB. INT. L.J. 275, 284 (2022) (“[W]hen faced with cognitive fatigue and a

Despite the monumental power Acosta had and routinely exercised in other cases, he refused to exercise any of this power when it came to Epstein. We will never know if the weight of conspiracy and Racketeer Influenced and Corrupt Organizations (RICO) charges, along with detention, would have pressured Epstein to accept a plea to lesser offenses, counts, or numbers of victims because Acosta refused to exercise the power he had. As will be argued in Part III, Section D, federal prosecutions of Black defendants, specifically R. Kelly and three ministers in Ohio, contrasts sharply with *Epstein*. In the cases where there were Black defendants, prosecutors magically knew what to do and just how to do it.

2. Federal Prosecutors Could Have Charged Epstein with Operating a Sex Trafficking Conspiracy

In addition to the arsenal of structural advantages and tools both state and federal prosecutors could have brought to bear on Epstein, they could have leveled the mighty cudgel of conspiracy charges. That is what the Southern District of New York did in its indictment of Epstein in 2019. The first charge that Geoffrey Berman, the United States Attorney in the Southern District of New York, lodged against Epstein was conspiracy to sex traffic.²²⁵ The duration of the conspiracy covers the same that Acosta had in front of him when he declined to prosecute Epstein. The Southern District of New York indictment also included violations Epstein committed at his Palm Beach estate.²²⁶ Florida prosecutors could have lodged conspiracy charges against both Epstein and those who groomed the girls on how to sexually satisfy him; office assistants who booked cars and travel for his victims; and recruiters who kept him with a ready supply of vulnerable flesh.²²⁷ In fact, the indictment that Florida prosecutors never filed against Epstein contained conspiracy charges.²²⁸

The power behind a prosecutor's discretion to charge a defendant with conspiracy prompted Judge Learned Hand to famously quip that conspiracy was "that darling of the modern prosecutor's nursery."²²⁹ Conspiracy charges

lack of information about an individual case, the prosecutor is more likely to rely on cognitive associations and stereotypes, such as an implicit association between Black men and drugs, to make determinations of guilt.").

²²⁵ Press Release: Epstein Charged, *supra* note 156.

²²⁶ Sealed Indictment, at 1, *United States v. Epstein*, 19 Crim. 490 (S.D.N.Y. July 2, 2019), available at <https://www.justice.gov/usao-sdny/press-release/file/1180481/download> [<https://perma.cc/CT43-MU34>] [hereinafter Epstein Indictment].

²²⁷ Harris et al., *supra* note 70.

²²⁸ OPR INVESTIGATION INTO THE U.S. ATTORNEY'S OFFICE, *supra* 126, at 37.

²²⁹ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925); CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW CASES AND MATERIALS* 853 (4th ed. 2019).

are so powerful that they are the subject of perennial criticism.²³⁰ Prosecutors have significant procedural advantages when they charge a person with conspiracy. For example, a conspiracy trial against Epstein could have been held either in a jurisdiction where any of his co-conspirators agreed to sex traffic for him or in any locale where they did an overt act to further sex trafficking for him.²³¹ Trying co-conspirators together increases the possibility that jurors will transfer prejudice from one defendant to another.²³² The Federal Rules of Evidence contain special accommodations for conspiracy charges, including exceptions to the prohibition against hearsay.²³³

Given the subjective nature of an “agreement” between conspirators, judges liberally admit circumstantial evidence to prove guilt.²³⁴ Even more advantageous, conspiracy charges do not require proof that the conspirators ever came close to actually committing sex trafficking.²³⁵ Under federal law, it is enough that the conspiracy took a substantial step in the direction of sex trafficking.²³⁶ Finally, under the Pinkerton Doctrine, a conspirator may be held liable for a crime committed by a co-conspirator even if that other crime was not part of the original agreement if the unintended crime was: (1) in furtherance of the conspiracy, (2) within the scope of the conspiracy, and (3) a reasonably foreseeable consequence of the original agreement.²³⁷

²³⁰ LEE & HARRIS, *supra* note 229, at 853.

²³¹ See WAYNE R. LAFAVE, CRIMINAL LAW 650 (5th ed. 2010); LEE & HARRIS, *supra* note 229, at 854; see, e.g., Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the Reves “Operation or Management” Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1 (2006) (discussing the application of § 1962(c) of RICO); Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585 (2008) (discussing vicarious criminal liability under *Pinkerton*); Amanda Seals Bersinger, Note, *Grossly Disproportional to Whose Offense? Why the (Mis)application of Constitutional Jurisprudence on Proceeds Forfeiture Matters*, 45 GA. L. REV. 841 (2011) (discussing “whether forfeiture of proceeds from a criminal enterprise is necessarily remedial”).

²³² Thomas J. Scorza, *Problems with Co-Conspirator Hearsay*, 16 LITIG. 30, 33 (1990).

²³³ See LAFAVE, *supra* note 231, at 653; LEE & HARRIS, *supra* note 229, at 854.

²³⁴ See Madeleine Cane et al., *Federal Criminal Conspiracy*, 58 AM. CRIM. L. REV. 925, 929 (2021).

²³⁵ See LAFAVE, *supra* note 231, at 654; LEE & HARRIS, *supra* note 229, at 854.

²³⁶ CONG. RSCH. SERV., SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW 10 (2015), <https://crsreports.congress.gov/product/pdf/R/R43597> [<https://perma.cc/Z97U-YGTH>].

²³⁷ *United States v. Stokes*, No. 10-00244-04-CR-W-DW, 2011 WL 1585601, at *1, *8 (W.D. Mo., Apr. 25, 2011) (“[A]lmost all of the evidence presented against co-defendants will also be admissible against defendant pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946)” which held that a member of a conspiracy may be held responsible for a co-conspirator’s acts and statements in furtherance of the conspiracy); see *United States v. Dixon*, 901 F.3d 1322, 1343 (11th Cir. 2018) (“Under *Pinkerton*, a ‘member of a conspiracy . . . is criminally liable’ for

To concretize the power Acosta had further: Prosecutors can charge low level drug couriers with a conspiracy to distribute large quantities of drugs and even murder because courts have routinely held that murder is within the scope of reasonably foreseeable conduct for drug cartels.²³⁸ In *Epstein*, Acosta could have charged low-level conspirators in Epstein's sex trafficking web with conspiracy and/or those higher up the hierarchy of Epstein's organization. Those expanded charges could have been leveraged against defendant witnesses to expose more of Epstein's sex trafficking pyramid and to pressure witnesses to testify against Epstein if the case had proceeded to trial. As a former federal prosecutor, I can assure the reader that these practices are routine.²³⁹

Additionally, the outsized power that RICO provides prosecutors has prompted noted legal scholars to argue that RICO charges are particularly nefarious because they are such a wide sweeping method of finding culpability that a "creative prosecutor might apply it to activity that should not be made criminal."²⁴⁰ Both RICO and conspiracy laws give prosecutors the power and authority to threaten low-level conspirators with prison or other severe repercussions for failing to cooperate with an investigation and offer sentence reductions in exchange for testimony about conspirators or people in the upper echelons of the criminal hierarchy.²⁴¹ RICO and

the 'reasonably foreseeable crimes' that other conspirators commit 'during the course of and in furtherance of the conspiracy.' (quoting *United States v. Moran*, 778 F.3d 942, 962 (11th Cir. 2015))).

²³⁸ See generally *Pinkerton v. United States*, 328 U.S. 640 (1946) (holding a defendant can be found liable for the substantive crime of a co-conspirator provided the crime was reasonably foreseeable and committed in furtherance of the conspiracy); *United States v. Martinez*, No. 19-1667, 2021 WL 3578343, at *16 (1st Cir. Aug 13, 2021) (holding that a defendant can be found liable for the substantive crime of a co-conspirator provided the crime was reasonably foreseeable and committed in furtherance of the conspiracy); *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (holding that to obtain a conviction for conspiracy to distribute controlled substances the government need not prove the defendant's knowledge of the drug type and quantity, only that it was reasonably foreseeable in the pursuance of the underlying conspiracy); *United States v. Alvarez*, 755 F.2d 830, 851 (11th Cir. 1985) (holding that *Pinkerton* liability for murder was properly imposed where the substantive crime was a reasonably foreseeable, though originally unintended, consequence of the conspiracy); *United States v. Rodriguez*, 34 F.4th 961, 974 (11th Cir. 2022) (holding that liability for a co-conspirator's possession of a firearm is proper where the co-conspirator's possession of the firearm was reasonably foreseeable); *United States v. Mothersill*, 87 F.3d 1214, 1219 (11th Cir. 1996) (holding that a murder conviction was proper where there was sufficient evidence "that the killing of individuals was a reasonably foreseeable consequence of the ongoing conspiracy . . .").

²³⁹ See Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 328 (2014).

²⁴⁰ Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, CRIM. L. BULL. (2007); *Complicit Bias*, *supra* note 221, at 197.

²⁴¹ Rosenberg, *supra* note 240; *Complicit Bias*, *supra* note 221, at 180–81.

conspiracy charges would have given Acosta unrestrained leverage to pressure low-level conspirators to expose information about Epstein and other co-conspirators. He would have had the means to climb the hierarchy of Epstein's sex trafficking scheme by flipping members of the conspiracy both horizontally and vertically, which is standard operation in federal prosecutions.²⁴² In Part III, Section D, I will juxtapose prosecutors' successfulness and willingness to use the power of RICO to charge and convict R. Kelly.

In stark contrast to the wrist-slapping eighteen-month sentence Epstein received, a federal conviction for sex trafficking would have resulted in much stiffer penalties. Under § 1591(b)(1), if a defendant is convicted of using force, fraud, or coercion or of trafficking a minor under the age of fourteen, the defendant receives a mandatory minimum of fifteen years in prison with no possibility of parole and could receive a sentence of up to life in prison.²⁴³ Under § 1591(b)(2), if a defendant traffics a minor aged fourteen to eighteen without force, fraud, or coercion, the mandatory minimum sentence is ten years without parole and the statutory maximum is life.²⁴⁴ Because sex trafficking convictions are subject to numerous enhancements under the United States Sentencing Guidelines, for example where a defendant has engaged in a repeated pattern of prohibited sexual activity (with minors), convictions for sex trafficking regularly exceed the mandatory minimum penalties.²⁴⁵

DOJ has at its disposal veteran federal prosecutors who are experts in sex trafficking cases. Indeed, the department has an entire division devoted to human trafficking, centered at its headquarters in Washington, D.C. Federal prosecutors have written manuals on how to prosecute sex traffickers available on the web.²⁴⁶ Current and former federal prosecutors have written law review articles detailing how to successfully prosecute sex trafficking cases, which include information about how to overcome defense tactics and strategies.²⁴⁷ The National Advocacy Center, the national training center for all federal prosecutors, holds regular department-wide trainings on how to

²⁴² Rosenberg, *supra* note 240.

²⁴³ 18 U.S.C.S. § 1591(b)(2) (2018).

²⁴⁴ *Id.*; Parker & Skrmetti, *supra* note 182, at 1045.

²⁴⁵ Parker & Skrmetti, *supra* note 182, at 1031.

²⁴⁶ See, e.g., Exec. Off. for the U.S. Att'y, *Human Trafficking*, THE U.S. ATT'YS' BULL. (2017), <https://www.justice.gov/usao/page/file/1008856/download> [https://perma.cc/6AA2-VTU4].

²⁴⁷ See generally Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342 (2015) (elaborating on the prosecution of sex-trafficking cases written by two Assistant United States Attorneys); Parker & Skrmetti, *supra* note 182, at 1031.

prosecute sex trafficking cases. In sum, Acosta had access to opulent resources for prosecuting Epstein for child sex trafficking.

3. Prosecutors Have an Arsenal of Tools for Obtaining a Favorable Result, Including Wiretaps, Search Warrants, and Arrest Warrants

Although § 1591 is the main federal sex trafficking statute, federal prosecutors have a full arsenal of additional counts and charges from other relevant laws at their disposal when prosecuting sex trafficking cases.²⁴⁸ For example, anyone who obstructs the investigation of a § 1591 violation or who refuses to cooperate in an investigation can be charged with obstruction and made to register as a sex offender (even where the person has not engaged in sex trafficking itself).²⁴⁹ It is alleged that when Palm Beach police were investigating Epstein around 2005, one of Epstein's assistants and co-conspirators removed three computers from his Florida estate that police had reason to believe contained images of his naked minor victims.²⁵⁰ When investigators executed the search warrant for Epstein's Manhattan estate, they found a safe that contained "an extraordinary volume of photographs of nude and partially-nude young women or girls."²⁵¹ This evidence could well have resulted in a federal conviction for possession of child pornography as well as obstruction under § 1591, which would have mandated sex offender registration, a lethal leveraging device when attempting to solicit cooperation with the Government's case.

²⁴⁸ Other statutes already prohibit engaging in sex with minors. *See, e.g.*, 18 U.S.C. § 2241(c) (aggravated sexual assault); 18 U.S.C. § 2422(b) (coercion and enticement); 18 U.S.C. § 2423(b) (transportation of minors); *United States v. Jungers*, 702 F.3d 1066, 1074 (8th Cir. 2013) (holding that if 18 U.S.C. § 1591 did not apply to purchasers, that would render other parts of the TVPA ineffective); *Parker & Skrmetti*, *supra* note 182, at 1031 (discussing how 18 U.S.C. § 1591 has harsh punishments for sex trafficking).

²⁴⁹ The crux of the problem lies at the intersection of the Sex Offender Registration and Notification Act (SORNA) and the federal sex trafficking statute, 18 U.S.C. § 1591 (2012). In its plain language, SORNA mandated sex-offender registration for anyone who violates § 1591. 42 U.S.C. § 16901 (2012). Section 1591, however, has two prohibitions: (1) a sex trafficking provision under § 1591(a) and (2) its own obstruction provision under § 1591(d). Consequently, SORNA mandates that a defendant who is guilty of obstructing a federal sex trafficking prosecution but has not engaged in actual sex trafficking or even a sexual offense must register as a sex offender under the national sex offender registry. *Complicit Bias*, *supra* note 221, at 140.

²⁵⁰ "When Palm Beach police were investigating Mr. Epstein around 2005, Ms. Ross removed three computers from the Florida mansion, Mr. Banasiak, the house manager, said in a deposition. The police noted in their reports that the computers, which they had reason to think might contain photos of naked girls, were missing when investigators arrived." Harris et al., *supra* note 70.

²⁵¹ Memorandum from U.S. Dep't of Just. on Jeffrey Epstein Detention to The Honorable Henry Pitman 19 Cr. 490, at 6 (RMB) (July 8, 2019) (on file with author) [<https://perma.cc/7B3U-PR8J>].

Acosta could have used the information the FBI obtained in Florida to apply for a federal wiretap, a common practice in federal prosecutions. Prosecutors could have “flipped” a witness and/or victim and convinced them to wear a wire during conversations with Epstein about scheduling sex acts or what happened in the massage room. Prosecutors could have used an undercover agent posing as an underage girl and recorded the undercover operation. Florida prosecutors could have obtained recordings of Epstein’s calls from jail (had he been detained), a common practice with drug dealers. They could have executed search warrants for Epstein’s Palm Beach estate, including warrants for his computers. The will to prosecute that the Southern District of New York demonstrated against Epstein contrasts sharply with Acosta’s lack of action. The evidence the Southern District of New York collected from Epstein’s Manhattan residence may have corroborated sex trafficking charges and exposed Epstein to additional federal charges involving the possession of child pornography.

C. *The Inadequacy of Epstein’s Potential Defenses*

The following section examines the counter arguments that could have been used in response to Epstein’s possible defenses and demonstrates that Epstein’s defense was not unassailable.

1. The Rape Shield Law Bars Any Attempts to Admit Evidence of Consent or Sexual Reputation

Generally, jurors on both grand and petit juries more readily recognize criminality in cases involving child sex trafficking or cases involving aggressive or sensationalized displays of force, such as being chained to a radiator with barbwire.²⁵² Because many of Epstein’s victims were minors, however, evidence regarding their consent would have been inadmissible and excluded on relevancy grounds²⁵³ as well as the Rape Shield Rule.²⁵⁴ The Rape Shield Rule, contained in Federal Rule of Evidence 412, excludes evidence about the sexual predisposition and behavior of an alleged victim of sexual misconduct, with some exceptions.²⁵⁵

Despite these evidentiary protections for minor victims of sexualized violence, Epstein assembled a defense team to rummage through the backgrounds of Epstein’s child victims.²⁵⁶ The experienced lawyers on his

²⁵² *Stop Traffic*, *supra* note 9, at 162, 166–67.

²⁵³ FED. R. EVID. 401.

²⁵⁴ FED. R. EVID. 412.

²⁵⁵ *Id.*

²⁵⁶ Goodnough, *supra* note 85.

team, who included Jack Goldberger, Gerald B. Lefcourt, and Alan M. Dershowitz, would have known that a common defense tactic in sexualized violence cases, including sex trafficking, is putting the victim on trial or victim blaming.²⁵⁷ Defense attorneys in sexualized violence cases regularly use evidence to frame a victim as deserving of her victimization, using “slut shaming” or accusing the victim of “gold digging.”²⁵⁸ Prior to the grand jury proceedings, Dershowitz met with prosecutors to threaten them with information that could potentially undermine the credibility of Epstein’s victims, including their Myspace pages, which contained information about drug and alcohol use.²⁵⁹ Dershowitz’s intervention had the impact of delaying the state grand jury proceedings.²⁶⁰

When the jury convened in *Epstein*, State Attorney Barry Krischer presented only one witness even though law enforcement had identified at least thirteen victims.²⁶¹ In presenting that lone witness, the prosecutor made the fourteen-year-old’s Myspace pages the centerpiece of the grand jury presentation. He alleged that the victim changed her age, that she posted suggestive photos, and that she engaged in criminal activity.²⁶² Unfortunately,

²⁵⁷ *Stop Traffic*, *supra* note 9, at 171. Epstein organized a “legal dream team” consisting of Jack Goldberger, Gerald B. Lefcourt, Alan M. Dershowitz, and Roy Black. See Maddy Sauer, *Millionaire Employs Legal Dream Team in Sex Scandal*, ATTERBURY, GOLDBERGER, & WEISS P.A. (July 24, 2013), <http://agwpa.com/millionaire-employs-legal-dream-team-in-sex-scandal> [https://perma.cc/Y8Q2-PAD7]. Jack Goldberger, partner and co-founder of Atterbury, Goldberger, & Weiss P.A., has specialized in criminal defense litigation for over thirty years. *Trusted Criminal Defense Lawyers in West Palm Beach, Florida*, ATTERBURY, GOLDBERGER, & WEISS P.A. (2013), <http://agwpa.com> [https://perma.cc/F5JG-YG78]. Roy Black, nicknamed “The Professor” in Miami law circles, defended William Kennedy Smith in his rape trial in 1991, obtaining a defense verdict. Dominick Dunne, *The Verdict*, VANITY FAIR (Sept. 15, 2008), <https://www.vanityfair.com/magazine/1992/03/dunne199203> [https://perma.cc/VEP4-RUAJ]. Alan Dershowitz is a Harvard Law Professor and has defended clients such as Donald Trump and, most famously, O.J. Simpson. *The O.J. Verdict: Interview with Alan Dershowitz*, PBS (Oct. 4, 2005), <https://www.pbs.org/wgbh/pages/frontline/oj/interviews/dershowitz.html> [https://perma.cc/JNL5-Q7NC]. Finally, Gerald B. Lefcourt, who founded his own firm specializing in white collar crime, has completed over 20 years of service as Speaker of the N.Y.S. Assembly’s designee to the N.Y. commission on Judicial Nomination, and is currently President of the Foundation for Criminal Justice of the National Association of Criminal Defense Lawyers. *Firm Overview*, LEFCOURT LAW (2022), <http://www.lefcourtlaw.com> [https://perma.cc/QEC4-4SH7].

²⁵⁸ *Stop Traffic*, *supra* note 9, at 205.

²⁵⁹ Goodnough, *supra* note 85.

²⁶⁰ *Id.*

²⁶¹ There is some tension in exactly how many victims were identified. Compare *Palm Beach Post Investigation*, *supra* note 85 (stating thirteen victims), with Dahlia Lithwick, *How Alex Acosta Got Away With It for So Long*, SLATE (July 11, 2019, 4:38 PM), <https://slate.com/news-and-politics/2019/07/acosta-epstein-plea-deal-2008-ignored-victims.html> [https://perma.cc/GSX7-HGDT] (stating thirty-six victims).

²⁶² *Palm Beach Post Investigation*, *supra* note 85.

the details of the grand jury proceedings cannot be confirmed because the transcripts are under seal. Assuming that the claim is true for hypothetical purposes, the use of the victim's Myspace posts is problematic for many reasons.

First, the prosecutors in the state proceedings against Epstein used the grand jury proceedings to sanitize the perpetrator and pathologize the victim.²⁶³ As discussed *supra*, in Part II, Section B.1., grand jury proceedings are a distinct advantage for prosecutors.²⁶⁴ The number of witnesses in the grand jury and the quantity of their testimony is left to the sole discretion of the prosecutor, subject only to the burden of proof—whether there is probable cause to believe the defendant committed the crime.²⁶⁵

Second, the prosecution rarely cross-examines its own witnesses in the grand jury proceeding. Cross-examination is the domain of the adversary, but in grand jury proceedings there is no adversary.²⁶⁶ Consequently, prosecutors rarely cross-examine their own witnesses, and when they do, there is no nomenclature for it.²⁶⁷ This works to the advantage of prosecutors; they do not want to create contradictory testimony from their own witnesses. Such contradictory testimony becomes Giglio materials, and the prosecution is constitutionally obligated to turn those materials over to the adversary before trial.²⁶⁸ Creating Giglio materials is a sure path to destroying your own

²⁶³ See generally *Biased and Broken Bodies*, *supra* note 187 (analyzing the prosecution's use of the grand jury to try Michael Brown, the Ferguson youth Darren Wilson gunned down).

²⁶⁴ See *supra* Section II.B.1.

²⁶⁵ See generally SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:15 (2d ed. 2022), Westlaw GRJURLAW (discussing the role of federal and state prosecutors in the context of grand jury proceedings). See, e.g., *Wurster v. State*, 708 N.E.2d 587, 592 (Ind. Ct. App. 1999) ("It is without doubt that prosecutors are vested with wide discretion in matters of the grand jury."); *People v. Crumbaugh*, 594 N.Y.S.2d 553, 556–57 (N.Y. Sup. Ct. 1993) (discussing the broad discretion afforded to prosecutors including "[t]he determination of when and what charges to present to the Grand Jury . . .").

²⁶⁶ *Biased and Broken Bodies*, *supra* note 187, at 588.

²⁶⁷ *Id.*

²⁶⁸ In decimating its own witnesses, the prosecution created *Giglio* materials that could later be used to undermine the credibility of its witnesses—a feat highly peculiar in any criminal investigation. *Giglio* information or material refers to material tending to impeach the character or testimony of the prosecution witness in a criminal trial. See *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Biased and Broken Bodies*, *supra* note 187, at 581 (defining *Giglio* materials). *Giglio* materials may include plea agreements, where the prosecution and witness have brokered a recommended lower sentence to the sentencing court in exchange for more testimony from the witness if the case proceeds to trial. *Id.* By way of explanation and in order to set the historical development of *Giglio*, fifty-three years ago in *Brady v. Maryland*, the Supreme Court held that due process requires the prosecution to provide the defense upon request any evidence favorable to the accused which is material either to guilt or to punishment. *Brady v.*

witnesses. Moreover, the defense attorney can use the Giglio materials to cross-examine the prosecution's witnesses in the future.²⁶⁹ If a prosecutor destroys its own witness early in the proceedings, the witness remains destroyed for the duration of the proceedings and in any future proceedings, including civil proceedings.²⁷⁰

To protect against damaging a witness, a prosecutor can prepare a statement for the witness to read, have the witness review the statement with her lawyer to ensure absolute accuracy, and have the witness read the statement to the grand jury.²⁷¹ A prepared statement neutralizes the possibility that a witness will contradict themselves on the stand, in the moment, or later if they are called to testify.²⁷² Moreover, if the witness is later called to testify and cannot remember the facts, the examining attorney (usually the prosecutor) can ask the witness if reading their prior testimony will refresh their memory. Once the witness has refreshed their memory with the prior testimony, the prosecutor can ask to have the prior testimony admitted into evidence.²⁷³

Mike Edmonson, a spokesperson for Krischer, claimed that the state's attorney's office occasionally presented noncapital cases to the grand juries when there were issues involving witness credibility.²⁷⁴ In *Epstein*, it is unclear what credibility problems were identified in Epstein's victims. It is also unclear why the prosecutor selected a witness with alleged credibility problems.²⁷⁵ The prosecutors did not interview all the identified victims and

Maryland, 373 U.S. 83, 88 (1963). Over twenty years ago, in *Giglio*, the Supreme Court held that the government's Brady obligation to provide evidence to the defense encompasses evidence affecting a government witness' credibility. *Giglio*, 405 U.S. at 154. The prosecution violates due process when it "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." *Brady*, 373 U.S. at 87. However, the prosecution "cannot be compelled to disclose impeachment material which would be covered by the Jencks Act relating to any potential government witness, whether it be a witness in the case-in-chief or a rebuttal witness." *United States v. Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988). "Further, the government need not disclose impeaching material in its possession relating to any potential defense witness where that impeaching material does not meet the Brady test of being material and exculpatory." *Id.* In sum, the prosecution is not constitutionally obligated to release exculpatory information about a witness prior to trial.

²⁶⁹ *Biased and Broken Bodies*, *supra* note 187, at 581.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 589.

²⁷² *Id.* at 588.

²⁷³ FED. R. EVID. 612.

²⁷⁴ Goodnough, *supra* note 85.

²⁷⁵ Jane Musgrave et al., *How the Epstein Saga Could've Been Ended Years Ago: To His First Prosecutors, Victims Were Prostitutes*, USA TODAY (Nov. 20, 2019, 8:43 AM),

thus lost the opportunity to identify potentially more credible victims (if there truly was a credibility problem).²⁷⁶ The witness credibility claim may be dubious; witness credibility did not inhibit the Southern District of New York from indicting Epstein in 2019.

Adam Horowitz, a lawyer who represented some of the victims, said that some of Epstein's victims were scared to testify because the Florida prosecutors had terrified them. Horowitz reported,

The prosecutors were saying, “These defense lawyers are going to go through your whole personal life, dig up your bad acts and your sex life.[?]” When they heard that from prosecutors, sure, they were intimidated They kept saying, “Are you sure you want to do this?”²⁷⁷

The ability of law enforcement, including federal agents, local law enforcement officials, and prosecutors, to tank a case by intimidating witnesses is the subject matter of its own article. However, witnesses often claim that they have been threatened and intimidated by law enforcement, particularly where law enforcement lacked the desire to prosecute. Law enforcement—including prosecutors—are all too familiar with their ability to destroy a case by destroying its witnesses.²⁷⁸

According to Edmonson, Krischer did not recommend a charge to the grand jury; instead, he gave the grand jury a menu of charges to select from.²⁷⁹ Routinely, at the outset of a grand jury presentation, prosecutors present a proposed indictment with specific recommendations for charges against the suspect, explain each element of the charges in the proposed indictment, and advise the grand jurors about what anticipated evidence will satisfy each

<https://www.usatoday.com/story/news/2019/11/20/jeffrey-epstein-saga-couldve-been-ended-attorney-barry-krischer/4237757002/> [<https://perma.cc/6JE9-9HPT>] (“Krischer found a secret way to sink the case: He took it to a grand jury where only one victim testified. It was the first time a sex crimes case was presented to a grand jury by his office.”).

²⁷⁶ *Id.*

²⁷⁷ Robles et al., *supra* note 40.

²⁷⁸ Tracey L. Perrick, Comment, *Crawford v. Washington: Redefining Sixth Amendment Jurisprudence: The Impact Across the United States and in Maryland*, 35 U. BALT. L. REV. 133, 164 (2005) (discussing how if a defendant keeps a witness from testifying, he will likely only face witness intimidation charges and avoid prosecution for the underlying crime); Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165, 1220 (2002) (discussing that when witness intimidation is used to deceptively gain an advantage and prevent a crucial witness from testifying, the case could be decimated); Michael H. Graham, Lecture, *Witness Intimidation*, 12 FLA. ST. U. L. REV. 239, 242 (1984) (discussing conclusions by a Chicago Police Department representative that witness intimidation is sometimes viewed as an “innovative defense”—a way to secure an acquittal).

²⁷⁹ Goodnough, *supra* note 85.

element of a crime under a probable cause standard.²⁸⁰ In *Epstein*, prosecutors forfeited tremendous power to guide the grand jury's inquiry and ultimate decision.

Finally, and most importantly, under federal law, minors cannot consent to sex trafficking.²⁸¹ As discussed *infra*, the Rape Shield Rule, as well as Federal Rule of Evidence 412 and state counterparts, prevent the admission of evidence concerning the sexual predisposition and behavior of an alleged victim of sexual misconduct, subject to certain exceptions.²⁸² As a result, evidence concerning the victims' Myspace pages and Epstein's defense attorneys' claims about the victims' sexually suggestive behavior lack relevance and are both barred and inadmissible. They were equally irrelevant in the grand jury proceeding.²⁸³ Had *Epstein* proceeded to trial, it would have been imperative for the prosecution to file motions in limine barring such evidence. It would also have been imperative that the prosecutor make clear to the jury that sex trafficking victims were not on trial. This could have been done during voir dire and during opening and closing arguments. Prosecutors should understand that under no circumstances should they use evidence of sexually suggestive behavior to cross-examine a minor victim during the grand jury proceedings.²⁸⁴

If *Epstein* had proceeded to trial and if the trial court had admitted evidence of the peripheral sexual conduct of Epstein's victims, prosecutors

²⁸⁰ Katherine Goldwasser, *The Prosecution, the Grand Jury, and the Decision Not to Charge*, in FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 37, 38–39 (Kimberly Jade Norwood ed., 2016).

²⁸¹ See *United States v. Robinson*, 508 F. App'x 867, 870 (11th Cir. 2013) (rejecting defendant's assertion that a minor sex trafficking victim was not forced because "minors cannot consent to prostitution"); *United States v. Brooks*, 610 F.3d 1186, 1199 (9th Cir. 2010) (holding that a minor's consent does not mitigate a sex trafficking offense, similar to its nullity in cases of statutory rape or child molestation); *United States v. Campbell*, 764 F.3d 880, 888 (8th Cir. 2014) (excluding evidence of other acts of prostitution because minors cannot consent); *Stop Traffic*, *supra* note 9, at 228.

²⁸² FED. R. EVID. 412; FLA. STAT. ANN. § 794.022 (2022).

²⁸³ See *United States v. Culver*, 598 F.3d 740 (11th Cir. 2010) (concluding that exclusion of prior sexual history was not arbitrary or disproportionate to the purpose that Rule 412 was designed to serve); *United States v. Curtis*, 513 F. App'x 823 (11th Cir. 2013) (stating evidence is inadmissible when offered to prove an alleged victim engaged in other sexual behavior or to prove the victim's sexual predisposition); *United States v. Sarras*, 575 F.3d 1191 (11th Cir. 2009) (stating that part of the point of Federal Rule of Evidence 412 was that victims can be traumatized regardless whether or not they've had other sexual relationships); Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. Fed. 4th 283 (1980); Danny R. Veilleux, Annotation, *Admissibility of Evidence that Juvenile Prosecuting Witness in Sex Offense Case had Prior Sexual Experience for Purposes of Showing Alternative Source of Child's Ability to Describe Sex Acts*, 83 A.L.R. Fed. 4th 685 (1991).

²⁸⁴ *Stop Traffic*, *supra* note 9, at 172–73.

could have done two things. First, they could have marshaled reams of case law that clearly held that a victim's sexual behavior lacks relevance.²⁸⁵ In that regard, they could have proposed in limine motions as well as jury instructions directing jurors to disregard such evidence.²⁸⁶ Second, the sexually suggestive conduct of some of Epstein's victims is consistent with the behavior of many victims of sexualized violence, particularly young girls who suffer from many layers of alienation and who find a measure of self-worth through "likes" on their social media page.²⁸⁷ Both the prosecutor and the sex trafficking expert could have explained this to the jury.²⁸⁸

2. Dual Prosecutions Are Permissible

Both federal and state prosecutors could have pursued simultaneous prosecutions. When Acosta attempted to "rewrite history" by claiming that his office took necessary action to protect Epstein's victims, Krischer himself noted,

No matter how my office resolved the state charges, the U.S. attorney's office always had the ability to file its own federal charges. If Mr. Acosta was truly concerned with the

²⁸⁵ See generally FED. R. EVID. 412; State ex rel. Harvey v. Yoder, 239 W. Va. 781, 785 (W. Va. 2017) (holding that the defendant seeking to introduce evidence of the eleven-year-old victim's prior sexual activity was clear violation of rule 412); United States v. Bordeaux, 400 F.3d 548, 558 (8th Cir. 2005) (holding that the purpose of Fed. R. Evid. 412(a)(1) is to protect alleged victims of sexual assault from embarrassment and harassment).

²⁸⁶ United States v. Pulido, No. 8:20-CR-292-VMC-CPT, 2022 U.S. Dist. LEXIS 31924, at *3 (M.D. Fla. Feb. 23, 2022) (stating the Rule was not meant to be used as a tool for the perpetrator to silence a victim of misconduct); O'Brien v. Chaparro, No. 05-80342-CIV-COHN, 2005 U.S. Dist. LEXIS 46214 (S.D. Fla. Dec. 7, 2005) (addressing motions in limine before trial for evidence that may be prejudicial); Keelan v. United States, No. 17-20158-CIV-MARTINEZ/GOODMAN, 2020 U.S. Dist. LEXIS 24595 (S.D. Fla. Feb. 11, 2020) (denying a motion for discovery where the motion is in actuality a successive § 2255 motion); Annie Soo Yeon Ahn, *Friendly Limiting Instructions*, 52 U. S.F. L. REV. 353, 363 (2018) ("Parties and their attorneys may present arguments to the judge in a motion in limine or during sidebar about whether evidence should be admitted, excluded, or admitted with limiting instructions."); Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 138 (2013) (explaining the judge's ability to give a limiting instruction after the jury hears impermissible information).

²⁸⁷ *Stop Traffic*, *supra* note 9, at 158 (citing to Shaila Dewan, *She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html> [<https://perma.cc/8ARZ-VDYG>]). Victims of sexual violence often act in ways that may seem counterintuitive to members of a jury, cutting against traditional understandings of how a victim "should" act. Counterintuitive behaviors, however, are often a result of, a reaction to, or a coping mechanism stemming from the sexual violence itself. See generally PATRICIA L. FANFLIK, AM. PROSECUTORS RSCH. INST., VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? (2007) (discussing responses to sexual violence).

²⁸⁸ *Stop Traffic*, *supra* note 9, at 173.

state's case and felt he had to rescue the matter, he would have moved forward with the [fifty-three]-page indictment that his own office drafted.²⁸⁹

Similarly, in remarking on Acosta's excuses for lack of prosecution by casting blame on the state prosecutors, Barbara McQuade, former United States Attorney for the Eastern District of Michigan and now law professor, remarked,

Regardless, who gets to bring charges in such a case is never the sort of zero-sum turf battle either man is making it out to be—as former federal prosecutor Barbara McQuade notes: “He could have allowed the state prosecutor to do whatever he wanted with the state case and still pursued his own separate federal charges. Sometimes prosecutors work cooperatively with state prosecutors to work out a global resolution when it is in their clients’ mutual interest, but it is certainly not required.”²⁹⁰

Thus, contrary to Acosta's attempts to deflect blame onto the State of Florida, Acosta was freely able to pursue dual prosecution.²⁹¹

3. Federal Prosecutors Did Not Have to Prove that Epstein Knew or Recklessly Disregarded the Ages of His Victims

In a classic gesture of victim blaming, Epstein's all-star team defended him against allegations of pedophilic rape by claiming that the victims lied about their ages, exaggerated their stories, and were unreliable witnesses who were prone to drug addiction.²⁹² Claims that Epstein was not aware of his victims' ages, however, are belied by the allegations of his victims. According to some victims, Epstein specifically directed his recruiters to find young

²⁸⁹ Lithwick, *supra* note 261.

²⁹⁰ *Id.*; see also Barbara McQuade, *Acosta's Legal Explanation for Epstein's Plea Deal Doesn't Add Up*, N.Y. MAG. (July 11, 2019), <https://nymag.com/intelligencer/2019/07/acosta-epstein-plea-deal-explanation-doesnt-add-up.html> [<https://perma.cc/NR94-UDPE>].

²⁹¹ *Id.*

²⁹² *How a Future Trump Cabinet Member, supra* note 7.

girls.²⁹³ And according to other victims who were minors when Epstein raped them, Epstein knew their age because they told him how old they were.²⁹⁴

Moreover, under Federal Rule of Evidence 401,²⁹⁵ whether the victims lied about their ages is irrelevant because if Epstein had a reasonable opportunity to view the victims, he is held strictly liable for having nonconsensual sex with minors.²⁹⁶ Federal prosecutors do not need to prove that Epstein knew the minor victims' ages; rather, the government only needs to prove that Epstein had "a reasonable opportunity to view the victim *in lieu of proving knowledge*" or that he recklessly disregarded their ages.²⁹⁷ Thus, any trafficker who has had a reasonable opportunity to observe a minor victim is held strictly liable for their actions.²⁹⁸

4. Sex Trafficking Prosecutors Did Not Have to Prove That Epstein Crossed State Lines

On July 10, 2019, the *New York Times* reported that:

Prosecutors who worked with Mr. Acosta said that the federal case presented them with legal challenges that made the matter more suited to a state court. Federal laws, they said, would have required the United States attorney's office to prove that Mr. Epstein, a financier, crossed state lines with the intent to commit the acts.²⁹⁹

²⁹³ One victim recruiter told lawyers she made \$200 for every high school girl she brought to the Palm Beach mansion. She recruited the girls from her high school, including one who was 14. When she brought a 23-year-old, Mr. Epstein balked. Too old, he told her. Harris et al., *supra* note 70.

²⁹⁴ Epstein Indictment, *supra* note 226, at 4; *see also Palm Beach Post Investigation*, *supra* note 85 ("Further, notes seized by police from Epstein's mansion belied his continuous claims that he didn't know any of the girls were minors. One note said that a teen couldn't come over at 7 p.m. because of soccer. Another said a girl had to work Sunday but was willing to come later in the week 'Monday after school?' the note asked. In a desk drawer, police found a copy of one victim's high school transcripts. 'The younger the better' was Epstein's mantra, one recruiter said.").

²⁹⁵ FED. R. EVID. 401; *United States v. Deverso*, 518 F.3d 1250, 1254 (11th Cir. 2008).

²⁹⁶ *United States v. Whyte*, 928 F.3d 1317, 1329–30 (11th Cir. 2019) ("Proof that a defendant had a 'reasonable opportunity to observe' the victim relieves the government of its burden of proving that the defendant either knew or recklessly disregarded the victim's age."); *see also Justice for Victims of Trafficking Act of 2015*, 18 U.S.C. § 1591(c).

²⁹⁷ *Whyte*, 928 F.3d at 1328 (quoting *United States v. Robinson*, 702 F.3d 22, 31 (2d Cir. 2012)); 18 U.S.C. § 1591(c); *see also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW* § 2, at 56 (2012) (explaining that "words are given meaning by their context," which includes the provision's purpose as "derived from the text").

²⁹⁸ Parker & Skrmetti, *supra* note 182, at 1042.

²⁹⁹ Robles et al., *supra* note 40.

The prosecutors the *New York Times* cited were flatly wrong. It is a common misperception that sex trafficking involves taking victims over state lines.³⁰⁰ Although much sex trafficking involves interstate trafficking domestically and internationally, courts have interpreted the Commerce Clause to give Congress the broad “power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³⁰¹ When Congress enacted the Trafficking Victims Protection Act, it explicitly stated that trafficking of persons has an aggregate economic impact on interstate and foreign commerce.³⁰²

Section 1591 requires that the government prove the activity was “in or affecting interstate or foreign commerce.”³⁰³ The phrase “affecting commerce” is a term of art that “ordinarily signal[s] the broadest permissible exercise of Congress’ Commerce Clause power.”³⁰⁴ That power reaches “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³⁰⁵ The Eleventh Circuit (the federal appellate court for Florida) has squarely held that sex trafficking—“even when it occurs ‘solely in Florida’”—“ha[s] the capacity when considered in the aggregate . . . to frustrate Congress’s broader regulation of interstate and foreign economic activity.”³⁰⁶

“In or affecting interstate or foreign commerce” presents a very low evidentiary bar.³⁰⁷ The Eleventh Circuit has also held that enticing commercial sex alone satisfies the jurisdictional element, even in a case involving purely intrastate sex trafficking.³⁰⁸ A district court in the Southern

³⁰⁰ Parker & Skrmetti, *supra* note 182, at 1043–45.

³⁰¹ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *see also* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551–53 (2012) (discussing limits on the Commerce Clause power in compelling individuals to participate in commerce); *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (holding that Congress can regulate prices under the Commerce Clause); Parker & Skrmetti, *supra* note 182, at 1045 (discussing the opportunities under the TVPA to punish and deter sex trafficking).

³⁰² H.R. 3244, 106th Cong. (2000) (codified at § 102(b)(12)) (“Trafficking in persons substantially affects interstate and foreign commerce.”); 22 U.S.C. § 7101(b)(12) (2006); Parker & Skrmetti, *supra* note 182, at 1045.

³⁰³ 18 U.S.C. § 1591(a)(1); Parker & Skrmetti, *supra* note 182, at 1045.

³⁰⁴ *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *United States v. Baston*, 818 F.3d 651, 664 (11th Cir. 2016).

³⁰⁵ *Raich*, 545 U.S. at 17; *Baston*, 818 F.3d at 664.

³⁰⁶ *Baston*, 818 F.3d at 665 (citing *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007)).

³⁰⁷ *Evans*, 476 F.3d at 1179 (quoting 18 U.S.C. § 1591(a)(1)).

³⁰⁸ *Evans*, 476 F.3d at 1179 (quoting Order Denying Motion to Dismiss Indictment at 10, *United States v. Madison et al.*, No. 05-20444-CR-PAS (S.D. Fla. Nov. 23, 2005) (“Evans’s

District of Florida has held that “case-specific evidence of interstate activity is not required to sustain [a § 1591] Indictment.”³⁰⁹ Evidence that satisfies the low standard in § 1591 includes the use of condoms in commercial sex acts that are manufactured out of state;³¹⁰ the use of a cellular telephone or e-mail to schedule minors for sex;³¹¹ use of the internet to post advertisements for commercial sex on Backpage;³¹² use of a hotel that provides rooms for interstate travelers;³¹³ and the purchase of gifts for victims from a business that operates in interstate commerce.³¹⁴

In *Epstein*, a victim alleged that one of his handlers told her that Epstein wanted her “to go on a diet to lose about [eleven] pounds to maintain her slim figure.”³¹⁵ The victim emailed the handler, stating, “Please could you also let him know that I am now [fifty-seven] kg and that everything is going well.”³¹⁶ The email exchange would satisfy the jurisdictional requirement. Contrary to the erroneous claims of the federal prosecutors in the *New York Times* article, neither the district court in the Southern District of Florida nor the Eleventh Circuit require proof that Epstein crossed state lines to engage in sex acts; rather, the use of something as small as a cell phone (to arrange liaisons, for example) would satisfy the jurisdictional requirement.³¹⁷

entertainment of Jane Doe to commit prostitution, even though his actions occurred solely in Florida, had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress’s broader regulation of interstate and foreign economic activity. As noted by the district court, “[w]hile [Evans’s] activities may be minor in the national and international market of trafficking children for commercial sex acts, his acts contribute to the market that Congress[s] comprehensive scheme seeks to stop.”; see also Parker & Skrmetti, *supra* note 182, at 1045 (discussing the opportunities under the TVPA to punish and deter sex trafficking).

³⁰⁹ United States v. Williams, No. 12-60116-CR-RNS, 2012 WL 3242043, at *4 n.4 (S.D. Fla. Aug. 7, 2012); Parker & Skrmetti, *supra* note 182, at 1045.

³¹⁰ See United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004) (holding that evidence that “pimps furnished their prostitutes with condoms manufactured out of state . . . supports a finding that the activities of the enterprise affected interstate commerce”); see also Evans, 476 F.3d at 1179–80; Parker & Skrmetti, *supra* note 182, at 1045.

³¹¹ *Pipkins*, 378 F.3d at 1295; Parker & Skrmetti, *supra* note 182, at 1045.

³¹² *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov’t Affs.*, 115th Cong. 4–5 (2017).

³¹³ Evans, 476 F.3d at 1179 (“[Defendant’s] use of hotels that served interstate travelers [is] . . . further evidence that [his] conduct substantially affected interstate commerce.”); Parker & Skrmetti, *supra* note 182, at 1045.

³¹⁴ United States v. Chappell, Crim. No. 09-139 (JNE/JJK), 2010 WL 1131474, at *7 (D. Minn. Jan. 12, 2010); Parker & Skrmetti, *supra* note 182, at 1045.

³¹⁵ Harris et al., *supra* note 70.

³¹⁶ *Id.*

³¹⁷ Evans, 476 F.3d at 1178–79 (applying the *Raich* standard and finding that using condoms that had been manufactured in a different state and using a cellular phone were sufficient to satisfy the “interstate or foreign commerce” element of § 1591(a)(1)).

Furthermore, in a separate civil proceeding, a federal district court judge found that “Epstein and his co-conspirators knowingly traveled in interstate and international commerce to sexually abuse” children and thereby committed violations of not only Florida law, but also federal law.³¹⁸ Still further, the Southern District of New York charged Epstein with “frequently travel[ing] from New York to Palm Beach by private jet, before which an employee or associate would ensure that minor victims were available for encounters upon his arrival in Florida.”³¹⁹ It is clear, therefore, that the jurisdictional requirement could have been easily met.

III. POWERFUL WHITE PEOPLE GET ALL THE PROCESS; BLACK PEOPLE GET NONE

Given the overwhelming evidence against Jeffrey Epstein and the legal arguments available to the prosecution, the failure to prosecute him brings into sharp relief the impact of white heteropatriarchy on the criminal legal process. Epstein sits at the epicenter of two historic phenomena: (1) the ironic underprosecution of sexualized violence in an unprecedented era of hyperincarceration and (2) the impact of both white supremacy and white heteropatriarchy on the criminal legal process.³²⁰ *Epstein* highlights the inherent inequality between the process the criminal legal system provides an elite white male rapist of girls and the process given to other suspects.³²¹ *Epstein* is paradigmatic of what India Thusi calls the pathology of prosecutors and a deeply flawed criminal legal system.³²²

Epstein demonstrates two things: (1) as Portia Pedro argues³²³, embodiment dictates process and (2) criminal legal process entertains two different burdens of proof in which elite white males are afforded a presumption of innocence, and Black people are filtered through a lens of presumptive guilt, suspicion, and the need to be controlled, all of which create a lesser burden of proof to convict Black bodies. White heteropatriarchy creates a world in which prosecutors (and triers) make

³¹⁸ *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1204 (S.D. Fla. 2019).

³¹⁹ Epstein Indictment, *supra* note 226, at 6, ¶ 14.

³²⁰ See generally Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 WASH. U. J.L. & POL'Y 67 (2011) (writing that Epstein sits at the center of under-prosecution of sexual violence and white supremacy and heteropatriarchy).

³²¹ Levine, *supra* note 201, at 750.

³²² See generally Thusi, *supra* note 14 (writing of the deeply flawed criminal legal system and how Epstein benefits).

³²³ Pedro, *supra* note 15, at 154.

charging decisions based on a relative value judgment between victims and assailants. Sympathy clings to the straight, white, male, upper class body and villainy clings to the societally vulnerable victim. In intraracial sexualized violence cases involving female victims and male perpetrators, verdicts reflect the relative societal value between men and women, allowing gender implicit bias to inextricably link pathology to women and valor to men.³²⁴ In interracial sexualized violence cases, however the contrary is true. Race implicit bias drapes the perpetrator with animality and the victim with sympathy. Prosecutors found Epstein, an intraracial rapist, deserving of sympathy and his victims deserving of derision, a fundamental precept of rape culture.

A. *Black People Are Disappeared*

Black men are “disappeared” from daily life in the United States.³²⁵ More than one out of every six Black men between twenty-five and fifty-four years old have disappeared, primarily from incarceration and premature death.³²⁶ For whites, however, the disappearance gap barely exists.³²⁷ “Of the 1.5 million missing Black men from [twenty-five] to [fifty-four]—which demographers call the prime-age years—higher imprisonment rates account for almost 600,000.”³²⁸ Almost one in twelve Black men in this age group are behind bars, compared with one in sixty nonblack men in the same age group, one in 200 Black women, and one in 500 nonblack women.³²⁹ This has resulted in a lifelong gender gap between Black men and women, not found among white Americans.³³⁰ Black women who are twenty-five to fifty-four and not in jail outnumber Black men in that category by 1.5 million. For every 100 Black women in this age group living outside of jail, there are only eighty-three Black men. Among Whites, the equivalent number is ninety-nine, near parity.³³¹

³²⁴ *Stop Traffic*, *supra* note 9, at 211.

³²⁵ Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), <https://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html> [<https://perma.cc/PTA5-KCGY>].

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ Justin Wolfers et al., *supra* note 325; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 224 (10th Anniversary ed. 2020) (“The mass incarceration of people of color is a big part of the reason that a black child born today

In the United States, the rates of hyperincarceration are staggering: “from 1980 to 2008, the number of incarcerated persons quadrupled from 500,000 to 2.3 million.”³³² The United States remains the most carceral nation in the whole of human history, prompting Jeffrey Bellin to observe that “[t]he land of the free’ has become the world’s largest jailer.”³³³

It is in this context that Acosta declined to prosecute Epstein. At the time, DOJ was laboring under the infamous “Ashcroft Memo.” In 2003, John Ashcroft, former United States Attorney General, dispatched an edict throughout the halls of DOJ ordering federal prosecutors to charge “the most serious, readily provable offense.”³³⁴ The Ashcroft Memo provides a rare glimpse at the structural scaffolding supporting mass incarceration, a mandate from the DOJ hierarchy to incarcerate rigorously and robustly.³³⁵

Black Americans are incarcerated at almost six times the rate of white Americans; the lifetime probability of incarceration for Black boys and men born in 2001 is estimated to be thirty-two percent compared to six percent

is less likely to be raised by both parents than a black child born during slavery. The absence of black fathers from families across America is not simply a function of laziness, immaturity, or too much time watching Sports Center. Thousands of black men have disappeared into prisons and jails, locked away for drug crimes that are largely ignored when committed by whites.”); see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration of African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004) (“Mass incarceration dramatically constrains the participation of African American communities in the mainstream political economy. This civic exclusion stems largely from the ‘invisible punishments’ that accompany a prison sentence.”).

³³² Zach Newman, “Hands Up, Don’t Shoot”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L. Q. 117, 135 (2015).

³³³ *Id.*; Bellin, *supra* note 200, at 836; see also *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/resources/criminal-justice-fact-sheet> [https://perma.cc/YWA8-36DF].

³³⁴ Susan Schmidt, *Ashcroft Issues Tougher Prosecutorial Guidelines*, WASH. POST (Sept. 23, 2003) <https://www.washingtonpost.com/archive/politics/2003/09/23/ashcroft-issues-tougher-prosecutorial-guidelines/e518d09b-91cc-4d38-aa12-63d00b1c6f62> [https://perma.cc/R7PJ-K252]. The directive to charge the most serious and readily provable offense is also codified in the DOJ manual. See U.S. DEP’T OF JUST., JUST. MANUAL § 9-27.300 (updated Feb. 2023), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300> [https://perma.cc/Y39N-HSYP].

³³⁵ See Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump’s DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195, 199–200 (2020). In addition to an aggressive charging directive, Professor O’Neill’s empirical examination of federal prosecutions from 1994–2000 showed that federal prosecutors accepted the overwhelming majority (roughly three quarters) of all cases referred to them by federal agencies. Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 271 (2003). As federal prosecutors and investigators received more resources, however, the rate of declination went down in each year of the study. Drug offenses were the least likely category to be declined, demonstrating that “federal resources are being spent chiefly upon crimes involving the use or trafficking of illegal drugs.” *Id.* at 272.

for white boys and men.³³⁶ Over the past few decades, the rate of female incarceration has grown twice as quickly as the male incarceration rate, but it has affected Black women disproportionately; Black women are twice as likely as white women to be incarcerated.³³⁷ More than sixty percent of people in prison are people of color, and one in ten Black men in their thirties is in prison or jail on any day.³³⁸ One in three Black boys will spend at least some of their lives in jail or prison, and one out of three Black males is under the criminal justice system's control.³³⁹

In 2014, more Black men were incarcerated and on probation or parole than were enslaved in 1850.³⁴⁰ Two-thirds of people of color in prison are there for drug offenses. Bennett Capers notes that although the crime rate in the United States is not exceptional, “[e]ach year our jails cycle through approximately ten million people, the vast majority charged with nonviolent crimes.”³⁴¹ In 2018, there were 1,654,282 arrests for drug-related offenses. Marijuana possession remains one of the top reasons for imprisonment even though some states have legalized it.³⁴² One third of people disenfranchised because of felony convictions are Black, which means that eight percent of

³³⁶ THOMAS P. BONCZAR, BUREAU OF JUST. STAT., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 (2003), <https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/piusp01.pdf> [<https://perma.cc/J6K9-HL9U>].

³³⁷ THE SENT’G PROJECT, INCARCERATED WOMEN AND GIRLS 2 (2022), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> [<https://perma.cc/KCT6-C4U5>].

³³⁸ THE SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf> [<https://perma.cc/V4QP-LGZH>].

³³⁹ *Id.*

³⁴⁰ Max Ehrenfreund, *There’s a Disturbing Truth to John Legend’s Oscar Statement About Prisons and Slavery*, WASH. POST (Feb. 23, 2015, 11:48 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/02/23/theres-a-disturbing-truth-to-john-legends-oscar-statement-about-prisons-and-slavery> [<https://perma.cc/9KYW-6RFY>].

³⁴¹ Capers, *supra* note 20, at 1563; ZHEN ZENG, U.S. DEP’T OF JUST., JAIL INMATES IN 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/QR96-URG6>] (noting that jails “reported 10.6 million admissions during 2016”); *see also* U.N. OFF. ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE 12 (2013) (showing that the U.S. homicide rate is actually below average).

³⁴² Susan Stellan, *Is the ‘War on Drugs’ Over? Arrest Statistics Say No*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html> [<https://perma.cc/8RY8-U6GD>].

all adult Black Americans are disenfranchised.³⁴³ “Black adults are four times more likely to lose their voting rights than all other adults.”³⁴⁴

The failure to prosecute Epstein epitomizes this dual system: one for the racialized and gendered rich and one for the racialized and gendered poor. Epstein was given every privilege the law allowed and some that went beyond the law. In 2008, the year Acosta chose not to prosecute Epstein, 562,800 Black men were in state and federal prisons.³⁴⁵ That year, one in five Black men and women who were remanded went to prison for a drug offense.³⁴⁶ Dorothy E. Roberts argues:

This astounding amount of human confinement should not be seen as an unfortunate consequence of crime prevention policies or as an isolated blemish on America’s otherwise fair system of criminal justice. Rather, prisons are part of a larger system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.³⁴⁷

Mass incarceration inequitably distributes life, death, marriage prospects, the ability to procreate, the right to vote, the ability to earn an income, and the capacity to participate in democracy. The extra process prosecutors give police and wealthy white men inequitably distributes innocence and guilt in ways that give the carceral state meaning in material reality. More pointedly, the data surrounding disappearance and mass incarceration further demonstrate how the criminal legal process actively facilitates state sanctioned premature death in vulnerable communities and life and liberty for white heteropatriarchs like Epstein.³⁴⁸

³⁴³ Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 *DEMOGRAPHY* 1796, 1807 (2017); Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), <https://news.uga.edu/total-us-population-with-felony-convictions> [<https://perma.cc/XR36-8T2F>].

³⁴⁴ Newman, *supra* note 332, at 136.

³⁴⁵ WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUST., PRISONERS IN 2008, at 2 (2010), <https://bjs.ojp.gov/library/publications/prisoners-2008> [<https://perma.cc/FK28-5GVX>].

³⁴⁶ PAUL GUERINO ET AL., U.S. DEP’T OF JUST., PRISONERS IN 2010, at 15 (2012), <https://bjs.ojp.gov/content/pub/pdf/p10.pdf> [<https://perma.cc/DG8P-N5ZW>]; HEATHER C. WEST ET AL., U.S. DEP’T OF JUST., PRISONERS IN 2009, at 32 (2011), <https://bjs.ojp.gov/content/pub/pdf/p09.pdf> [<https://perma.cc/2B5S-SBAL>].

³⁴⁷ Dorothy E. Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 13–14 (2019).

³⁴⁸ RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, & OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (Earl Lewis et al. eds., 2007) (defining racism as “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death”).

B. *The Twin Pathologies of White Heteropatriarchy and White Supremacy in Prosecutions*

The unhinged power, discretion, and structural advantages the Supreme Court grants to law enforcement, including prosecutors, collectively reflect a baseline assumption: Law enforcement can be trusted.³⁴⁹ And yet, recent years have shown a gradual erosion of public trust in law enforcement.³⁵⁰ Rachel Godsil and HaoYang Jiang quote a senior-level white prosecutor's lament: "All of us prosecutors want to do justice—we hold ourselves to a higher standard, so why aren't we trusted?"³⁵¹ Many white prosecutors believe that with training and conscious effort, they can reduce their own implicit bias.³⁵² Evidence of how structural racism operates among prosecutors, however, suggests that they cannot.³⁵³

A growing number of scholars in multiple disciplines are analyzing the racial impact of implicit bias on the work of prosecutors.³⁵⁴ Thus, however,

³⁴⁹ Capers, *supra* note 20, at 1594 (stating that "[p]art of the reason the Court provides so little oversight has to do with the trust courts extend to public prosecutors").

³⁵⁰ Mark Berman & Jessica Wolfrom, *Dwindling Ranks and Declining Public Trust Plague Police Agencies amid Summer of Protests*, WASH. POST (Sept. 18, 2020, 9:37 AM), https://www.washingtonpost.com/national/dwindling-ranks-and-declining-public-trust-plague-police-agencies-amid-summer-of-protests/2020/09/18/ff15182a-f84b-11ea-a275-1a2c2d36e1f1_story.html [<https://perma.cc/B9L9-GWX9>]; Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [<https://perma.cc/A8YC-BJTC>]; see also *Trust in America: Do Americans Trust the Police?*, PEW RSCH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police> [<https://perma.cc/P82N-SSRU>].

³⁵¹ Rachel D. Godsil & HaoYang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, 40 CDAA PROSECUTOR'S BRIEF 142, 142 (2018).

³⁵² See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 25 (2019).

³⁵³ See, e.g., Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 103 (2014); THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/9Z8N-6XEZ>]; IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 25 (2019); JAMES E. JOHNSON ET AL., BRENNAN CTR. FOR JUST., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial-Disparities-Federal-Prosecutions.pdf [<https://perma.cc/5BPT-N2TD>] (suggesting that white prosecutors do not reduce their own implicit bias through training and conscious effort).

³⁵⁴ Many scholars are analyzing the racial impact of implicit bias on the work of prosecutors. See, e.g., Godsil & Jiang, *supra* note 351, at 142–57; Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 CAL. L.R. 965 (2020); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3091–126

more pointedly and accurately frames white supremacy as the driving force of bias in the criminal justice system.³⁵⁵ As Thusi argues, prosecutors' implicit or explicit racial biases may lead them to treat certain defendants as more dangerous, suspicious, and in need of being controlled.³⁵⁶ Thusi's framework better explains the complicity of prosecutors in Epstein's scheme as well as the role of white heteropatriarchy in facilitating mass incarceration and criminalization for racialized people and the underincarceration and undercriminalization for white heteropatriarchs.³⁵⁷

Like policing, prosecution is a predominantly white male endeavor.³⁵⁸ According to a 2019 study of the demographics of prosecutors, in the United States, white men led seventy-five percent of prosecutors' offices, as compared to two percent led by women of color.³⁵⁹ Ninety-five percent of elected prosecutors are white.³⁶⁰ It is white people, namely white men, who have the power, authority, and discretion to decide who gets charged and how severely they should be punished.³⁶¹ The same white men get to decide whether there will be a victim, a legally cognizable human being worthy of seeking vindication. The implications of this are profound. As Thusi argues, the prosecutors' race, class, and gender, namely white, male, and professional class privilege, shields the prosecutorial function from transparency and scrutiny, and facilitates disparate punitiveness, the overcharging of Blacks,³⁶² the undercharging of whites, and the undercharging of sexualized violence

(2018); Sommers & Marotta, *supra* note 353, at 103–111; Berdejó, *supra* note 224, at 1187 (analyzing the racial impact of implicit bias on the work of prosecutors); *see also* James Queally, *San Francisco D.A. Unveils Program Aimed At Removing Implicit Bias from Prosecutions*, L.A. TIMES (June 12, 2019 11:00 AM), <https://www.latimes.com/local/lanow/la-me-san-francisco-da-prosecutions-implicit-bias-software-20190612-story.html> [<https://perma.cc/N4UZ-S5QV>]; Keith L. Alexander, *32 Black Federal Prosecutors in Washington Have a Plan to Make the Criminal Justice System More Fair*, WASH. POST (Sept. 5, 2020, 6:16 PM), https://www.washingtonpost.com/local/public-safety/32-black-federal-prosecutors-in-washington-have-a-plan-to-make-the-criminal-justice-system-more-fair/2020/09/05/1774d646-ed4b-11ea-ab4e-581edb849379_story.html [<https://perma.cc/JH4K-R9EM>].

³⁵⁵ *See* Thusi, *supra* note 14, at 800–01.

³⁵⁶ *See id.* at 811.

³⁵⁷ *See id.* at 800–01.

³⁵⁸ REFLECTIVE DEMOCRACY CAMPAIGN, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS' CLUB OF ELECTED PROSECUTORS 1 (2019) [hereinafter TIPPING THE SCALES], <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> [<https://perma.cc/4W8Q-EBA7>]; *see also* Thusi, *supra* note 14, at 817.

³⁵⁹ *See also* Thusi, *supra* note 14, at 817.

³⁶⁰ TIPPING THE SCALES, *supra* note 358, at 2.

³⁶¹ *See* Thusi, *supra* note 14, at 801–02.

³⁶² *Biased and Broken Bodies of Proof*, *supra* note 187, at n.6.

generally.³⁶³ As Thusi argues, “Anti-Blackness may contribute to the racial disproportionality of prosecution, but White privilege may shield prosecutors from scrutiny and facilitate punitive prosecutorial practices.”³⁶⁴ In *Epstein*, it was the intertwined, enmeshed white male heteropatriarchy of the suspect, defense attorneys, and the prosecutor that dictated the outcome, namely the embodiment of all facilitated exculpation. Furthermore, not only did embodiment dictate process,³⁶⁵ but *Epstein* further demonstrates that process reflects a relative value judgment between the suspect and his victims; here, a white heteropatriarch trumped child victims of sexualized violence.³⁶⁶

Several studies have documented the pervasiveness of racial bias throughout the system. Carlos Berdejó found that in Wisconsin, “[w]hite defendants are more likely than [B]lack defendants to receive a reduction in their principal initial charge” and that “white defendants initially charged with misdemeanors are more likely than [B]lack defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all.”³⁶⁷ The Sentencing Project has documented how people of color are more likely to face the harshest outcomes at each step of the process once a prosecutor’s office receives their case. During pretrial, people of color are more likely than white people to be detained and denied bail.³⁶⁸ The denial of bail increases pressure on a defendant to plead to avoid further pretrial detention, loss of liberty, loss of employment, the anxiety of uncertainty, strain on family relations, and societal stigma.³⁶⁹

As discussed *supra*, Part II, Section A, the prosecutors’ unmitigated, unchecked, and unreviewable decision to charge enables prosecutors to manipulate charges to create a presumption against bail where the evidence will support the charges.³⁷⁰ That decision impacts how prosecutors assess defendants’ guilt, whether to charge them, and what sentences to pursue.

³⁶³ Thusi, *supra* note 14, at 817.

³⁶⁴ *Id.*

³⁶⁵ Pedro, *supra* note 15, at 143.

³⁶⁶ *Stop Traffic*, *supra* note 9, at 182.

³⁶⁷ Berdejó, *supra* note 224, at 1240.

³⁶⁸ THE SENT’G PROJECT, *supra* note 353 (“Blacks and Latinos are more likely than whites to be denied bail, to have a higher money bond set, and to be detained because they cannot pay their bond.”); see also Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race [<https://perma.cc/34CT-XQ9PJ>].

³⁶⁹ Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives*, 32 PACE L. REV. 800, 848 (2012); Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 772–73 (2020); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417 (2017).

³⁷⁰ Capers, *supra* note 20, at 1568.

Praatika Prasad notes that in the courtroom, prosecutors regularly use language that triggers implicit bias among jurors: “Coded language that seems racially neutral but has roots in historical racial oppression is often used in summations.”³⁷¹ Racial discrimination continues during sentencing: Federal prosecutors “are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites.”³⁷² In 2016, Black and Latinx people were still grossly overrepresented in the prison populations at fifty-six percent, double their percentage in the United States adult population. White people were still grossly underrepresented in the prison population at thirty percent, about half their percentage of the United States adult population.³⁷³ A 2018 report on racial disparities in the United States criminal justice system concluded that “[t]he United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color.”³⁷⁴ Professor Carlos Berdejó accurately assesses that race is used as a proxy for criminality.³⁷⁵

While prosecutors use their power to decline to pursue some offenders, like Epstein, they simultaneously use their power to overcharge others. For example, an Alabama prosecutor indicted Marshae Jones, a Black woman, on manslaughter because her fetus died after she fought with another woman who shot her in the stomach.³⁷⁶ A Connecticut prosecutor charged Tanya McDowell, a poor Black woman, with larceny for enrolling her child in a better neighboring school district where she did not live, resulting in a five-year sentence.³⁷⁷ A California prosecutor leveled a three-strikes charge against Gary Ewing, a Black man, for stealing three golf clubs worth less than \$1,200; Ewing received a mandatory twenty-five to life sentence.³⁷⁸ Prosecutorial charging decisions are responsible for the fact that “a disproportionate number of individuals of a particular race are incarcerated and monitored for

³⁷¹ Prasad, *supra* note 354, at 3104.

³⁷² THE SENT’G PROJECT, *supra* note 353.

³⁷³ KENDI, *supra* note 353.

³⁷⁴ THE SENT’G PROJECT, *supra* note 353.

³⁷⁵ Berdejó, *supra* note 224, at 1241.

³⁷⁶ Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus’s Death*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html> [<https://perma.cc/X8ES-TNXL>]; see also Capers, *supra* note 20, at 1568.

³⁷⁷ Daniel Tepfer, *Tanya McDowell Sentenced to 5 Years in Prison*, CONN. POST (Mar. 27, 2012, 11:40 PM), <https://www.ctpost.com/news/article/Tanya-McDowell-sentenced-to-5-years-in-prison-3437974.php> [<https://perma.cc/JAH7-6TZW>].

³⁷⁸ Linda Greenhouse, *California’s 3-Strikes Law Tested Again*, N.Y. TIMES (Nov. 6, 2002), <https://www.nytimes.com/2002/11/06/us/california-s-3-strikes-law-tested-again.html> [<https://perma.cc/KP4X-H5EH>].

crimes often committed in roughly equal numbers by whites and African-Americans.”³⁷⁹

Racial disparities are reflected in the differing charging, convicting, and sentencing rates for offenses related to cocaine and opioids.³⁸⁰ Although whites are more likely to sell drugs and although Blacks and whites use drugs in equal numbers, Blacks are far more likely to be arrested for selling or possessing drugs than whites.³⁸¹ From 1980 to 2007, 9.3 million Black people were arrested on drug charges.³⁸² That astronomical number represents almost thirty-eight percent of all arrests for a population that has only recently reached thirteen percent of the total United States population.³⁸³ Ibram X. Kendi notes that harsher sentences for drug crimes are responsible for the massive explosion in incarceration rates since 1980.³⁸⁴ Like arrests and charging decisions, structural racism shapes the sentences prisoners have received since the War on Drugs. Nonviolent Black drug offenders remain in prisons for about the same length of time (58.7 months) as violent white criminals (61.7 months).³⁸⁵ “[P]rosecutors are more likely to grant pretrial diversions to [w]hite defendants than they are to grant these diversions . . . to Black or Latino . . . defendants with similar legal characteristics.”³⁸⁶

Yet white police officers, who kill Black children and unarmed Black men and women, or wealthy white men, like Epstein, are treated delicately in the

³⁷⁹ Levine, *supra* note 201, at 755.

³⁸⁰ Capers, *supra* note 20, at 1585; Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html> [<https://perma.cc/NH9J-ZJT2>].

³⁸¹ Stellan, *supra* note 342; see PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 232 (2018) (“White people don’t get locked up, or get less time, for the same conduct that sends black people to prison. When we wonder what would be the effect if most people who break the law were not locked up, we can look at white folks as an example of a community where that is already the case.”).

³⁸² HUM. RTS. WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES (2009), <https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states> [<https://perma.cc/2L4V-WPJX>].

³⁸³ *Id.*

³⁸⁴ KENDI, *supra* note 353, at 31.

³⁸⁵ MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007), <https://www.prisonpolicy.org/scans/sp/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf> [<https://perma.cc/VQ7D-KCX4>].

³⁸⁶ Traci Schlesinger, *Racial Disparities in Pretrial Diversion*, 3 RACE & JUST. 210, 210 (2013) (examining racial disparities in prosecutorial referrals to diversionary programs); see also Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1383 (2018) (“For victimless crimes, one has grounds to worry about the fate of alternative sanctions, like diversion, that tend to disproportionately favor white defendants.”).

rare circumstances where their criminality is exposed and reported. These most protected of suspects are the least likely members of society to be arrested mistakenly, to confess mistakenly, to be jailed while awaiting charges or indictments, or to be pushed into a harsh plea bargain. They are also given the greatest chance of never facing charges to begin with.³⁸⁷

By way of explaining these racialized disparities, Thusi argues the problem of prosecutorial discretion is the problem of whiteness:

[R]esearch consistently shows that Americans harbor implicit biases that favor White people over Black people. Americans also exhibit bias against Black people. Americans are more likely to perceive Black people as threatening and menacing and are less likely to believe them. Americans also have preferential biases toward White people. White people are more likely to benefit from positive associations, and Americans are more likely to believe and trust White people. These findings illustrate that White people benefit from perceptions of trustworthiness; prosecutors may particularly benefit from this presumption of trustworthiness that White people enjoy. For example, observers may presume that White prosecutors are more concerned with public safety. White prosecutors may also enjoy a more cooperative relationship with other system actors—including the police, who might assume that White prosecutors are on their side.³⁸⁸

While legal scholars have examined racial bias in prosecutorial outcomes, most have turned the pathological gaze on the Blackness of the defendants.³⁸⁹ *Epstein* demonstrates how a defendant's white heteropatriarchy can work in tandem with that of the prosecutor and the defense attorneys to dictate the legal outcome. *Epstein* illustrates how white male ruling class supremacy enables white heteropatriarchs to exercise their privilege in a punitive or lenient manner at their unchecked and highly discriminatory discretion.

C. *The Hyperunderincarceration of Sexualized Violence*

Epstein unfolded in the context of two trends in law enforcement: mass incarceration and the systemic underprosecution of sexualized violence. In

³⁸⁷ Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> [https://perma.cc/T4NE-23XA].

³⁸⁸ Thusi, *supra* note 14, at 821–22.

³⁸⁹ *Id.*

both trends, white heteropatriarchy is privileged.³⁹⁰ This is borne out in statistics: 995 defendants out of 1,000 who commit sexual assault will not go to jail or prison.³⁹¹ One out of every six American women has been the victim of an attempted or completed rape in her lifetime (14.8% completed, 2.8% attempted).³⁹² About three percent of American men—or one in thirty-three—have experienced an attempted or completed rape in their lifetime.³⁹³ A majority of child victims are twelve to seventeen years old.³⁹⁴ Of victims under the age of eighteen, thirty-four percent of victims of sexual assault and rape are under the age of twelve, and sixty-six percent of victims of child sexual assault and rape are twelve to seventeen years old.³⁹⁵

Like other forms of sexualized violence, sex trafficking is severely underprosecuted.³⁹⁶ Accurate numbers of trafficking victims are highly contested due to the complexity of the crime and difficulty in identifying victims. Some reports estimate that there are 100,000 to 300,000 child sex trafficking victims in the United States, although this number has been heavily criticized.³⁹⁷ The federal government estimates that 14,500 to 17,500 victims from abroad are sold into sex trafficking in the United States each year.³⁹⁸ In fiscal year 2021, the most recent year for available data, DOJ initiated 221 prosecutions for sex trafficking.³⁹⁹ Given that DOJ estimates that more than 20,000 sex trafficking victims are trafficked across just the Mexico-United States border annually, these numbers indicate a gross

³⁹⁰ “White heteropatriarchy” refers to a racialized system of power and control based on white supremacy, compulsory heterosexuality, patriarchy, and an imposed gender-binary system. *Biased and Broken Bodies of Proof*, *supra* note 187, at 573.

³⁹¹ SCOPE OF THE PROBLEM: STATISTICS, RAINN, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/DA6M-GEJV>].

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ ATTORNEY GENERAL JOHN ASHCROFT, U.S. DEP’T OF JUST., U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003, at 17–24 (2004), <https://www.justice.gov/archive/ag/annualreports/tr2003/050104agreporttocongressvpra v10.pdf> [<https://perma.cc/V4RV-RC5P>].

³⁹⁷ *Stop Traffic*, *supra* note 9, at n.29.

³⁹⁸ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004), <https://2009-2017.state.gov/documents/organization/34158.pdf> [<https://perma.cc/G775-7NDM>].

³⁹⁹ U.S. DEP’T OF STATE, 2022 TRAFFICKING IN PERSONS REPORT: UNITED STATES, <https://www.state.gov/reports/2022-trafficking-in-persons-report/united-states> [<https://perma.cc/H722-G5RT>].

underprosecution of sex trafficking cases, particularly when measured against the rates of prosecution involving the War on Drugs.⁴⁰⁰

In 2007, Acosta's office treated other sex trafficking suspects very differently from how it serviced Epstein.⁴⁰¹ It prosecuted Demond Levail Osley, a Black male, with sex trafficking a minor.⁴⁰² Osley ultimately received a thirty-year sentence.⁴⁰³ In 2007, Acosta's office charged two other men with two counts of sex trafficking of a minor and both received prison sentences instead of jail with work release.⁴⁰⁴ None of the cases involved over thirty victims, as *Epstein* did. To further concretize the irony of disparate treatment, one of Epstein's victims received more jail time for a drug offense than Epstein, and Epstein's jailors, who were allegedly inattentive during his alleged suicide, will also receive more jail time than Epstein did.⁴⁰⁵

While critics of prosecutorial discretion highlight how overprosecution of Black people has led to mass incarceration, not enough attention has been paid to the underprosecution of majority men who purchase sex. The underprosecution of white men for sex offenses works in tandem with both white supremacy and white heteropatriarchy. As Catharine A. MacKinnon notes, “[a]lmost all known buyers of people in prostitution are adult men from all walks of life, in the United States largely white, married, and middle

⁴⁰⁰ U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 206* (2009), <https://2009-2017.state.gov/documents/organization/123357.pdf> [<https://perma.cc/445V-QT4V>]; Jim Walters & Patricia H. Davis, *Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border*, 2 J. APPLIED RSCH. ON CHLD. INFORMING POL'Y FOR CHLD. RISK 1, 3 (2011).

⁴⁰¹ Casey Quinlan, *Alex Acosta Claims He Couldn't Have Done Any Better for Epstein's Victims*, THINK PROGRESS (July 11, 2019, 11:49 AM), <https://thinkprogress.org/labor-secretary-alex-acosta-claims-he-couldnt-have-done-any-better-for-epsteins-victims-a163341b3e2> [<https://perma.cc/LP64-DCLY>].

⁴⁰² *United States v. Osley*, 302 F. App'x 896 (11th Cir. 2008).

⁴⁰³ *Osley v. United States*, 751 F.3d 1214 (11th Cir. 2014) (Osley sought to overturn his conviction, but the court affirmed the lower court decisions).

⁴⁰⁴ Kara Scannell, *How Trump's Labor Secretary Is Integral to Understanding the Jeffrey Epstein Sex Abuse Scandal*, CNN (July 12, 2019, 10:34 AM), <https://edition.cnn.com/2019/07/09/politics/jeffrey-epstein-acosta-relationship/index.html> [<https://perma.cc/PU9Q-JAUJ>]; Quinlan, *supra* note 401.

⁴⁰⁵ *How a Future Trump Cabinet Member, supra* note 7; Julie K. Brown, *One of Jeffrey Epstein's Victims Now Has Her Name on a Crime Bill in Congress*, TAMPA BAY TIMES (Oct. 17, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/10/17/one-of-jeffrey-epsteins-victims-now-has-her-name-on-a-crime-bill-in-congress> [<https://perma.cc/9P4N-H2B8>] (describing the “loopholes that federal prosecutors tried to exploit to justify giving Epstein one of the most lenient plea deals for a serial child sex offender in history”); Quinlan, *supra* note 401; Ed Shanahan, *Jail Guards Charged in Epstein Suicide Could Avoid Prosecution*, N.Y. TIMES, (May 21, 2021), <https://www.nytimes.com/2021/05/21/nyregion/jeffrey-epstein-suicide-guards.html> [<https://perma.cc/2GAN-LBCV>].

class.”⁴⁰⁶ One study found that in King County, Washington, eighty percent of sex buyers are white men.⁴⁰⁷ In Pennsylvania, seventy-four percent of sex buyers are white men.⁴⁰⁸ “A 2017 study on sex buyers in Minnesota found that the majority of buyers in their state are white, middle-to-upper class, married men.”⁴⁰⁹ In a 2012 study of men who use the internet to buy sex, researchers found that virtually eighty-five percent of the buyers were white men.⁴¹⁰

Despite the overwhelming evidence that purchasers of sex are white men, as with drug offenses, young Black men are disproportionately prosecuted for sex trafficking. According to one study, from 2005 to 2015, Black males made up fifty-seven percent of the defendants in federally prosecuted cases involving minors and forty-three percent in cases involving adults.⁴¹¹ At the federal level, “defendants in cases of sex trafficking of minors—the type of trafficking case that carries the highest penalties and is most likely to be prosecuted—are significantly more likely to be young, [B]lack and male.”⁴¹² The selective focus on Black males for trafficking prosecutions, particularly where the victims are white, has been the subject of debate and criticism in the anti-trafficking movement.⁴¹³

⁴⁰⁶ CATHARINE A. MACKINNON, *SEX EQUALITY* (3d ed. 2016), 1535; *see also* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. REV. 271 (2011).

⁴⁰⁷ *Racial & Gender Disparities in the Sex Trade*, RIGHTS4GIRLS, <https://rights4girls.org/wp-content/uploads/2019/05/Racial-Disparities-FactSheet-Jan-2021.pdf> [<https://perma.cc/67EF-VHBJ>].

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ Vanessa Bouché & Mark Daku, *Who's Disproportionately Prosecuted for Human Trafficking? Young Black Men*, WASH. POST (Jan. 11, 2019, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/11/young-black-men-are-disproportionately-likely-to-be-prosecuted-for-human-trafficking-this-explains-why> [<https://perma.cc/9T3V-P57H>].

⁴¹² *Id.*; Julie Dahlstrom, *Op Ed: Sex Trafficking Defendants Have a New Face—White, Wealthy, and Well-Connected*, L.A. TIMES (July 18, 2019), <https://www.latimes.com/opinion/story/2019-07-17/sex-trafficking-jeffrey-epstein-harvey-weinstein> [<https://perma.cc/3KHX-MRWX>] (noting that “[t]he basic idea of trafficking emerged in the early 20th century in close association with notions of ‘white slavery,’ which was largely defined as the forced prostitution of white European women. In the United States, such racialized narratives remained center stage, as foreign national and African American men were often targeted for federal prosecution, and the media commonly portrayed trafficking as a problem connected with gangs, poverty, and inner-city violence”).

⁴¹³ Dahlstrom, *supra* note 412 (stating that “anti-trafficking efforts have long been criticized for their disproportionate focus on communities of color”).

D. Compare the Cases of R. Kelly and the Black Ministers in Ohio

When sex trafficking suspects are Black, prosecutors know exactly what to do and do not hesitate to prosecute to the fullest extent of the law. Two cases bear out the radically different process received by Epstein and Black defendants: Consider the cases of R&B megastar R. Kelly, and ministers Kenneth Butler, Anthony Haynes, and Cordell Jenkins. Unlike *Epstein*, in the case of Kelly, the federal government knew exactly what to do. It demonstrated its full panoply of prosecutorial might by charging Kelly with leading a criminal enterprise within the meaning of RICO for the sex trafficking of girls and women.⁴¹⁴ Not just one, but two United States Attorney's Offices charged Kelly: the United States Attorney for the Northern District of Illinois and the United States Attorney for Eastern District of New York.⁴¹⁵ The states of Illinois and Minnesota also charged Kelly.⁴¹⁶ Moreover, the state and the federal proceedings moved forward together, as quadruple prosecutions; Cook County of Illinois prosecutors charged Kelly with ten counts of aggravated criminal sexual abuse over incidents that allegedly took place from 1998 to 2010 and involved four victims, three of whom were thirteen to sixteen years old.⁴¹⁷ Each count carried a sentence of three to seven years. In May 2019, Cook County prosecutors also charged Kelly with eleven additional counts of sexual assault and abuse, Class X felonies that carry up to thirty years in prison each.⁴¹⁸ Both United States Attorney's Offices charged Kelly with sexual exploitation of a child, bribery, kidnapping, forced labor, and sex trafficking across state

⁴¹⁴ Press Release, U.S. Dep't of Just., U.S. Att'y Off., E.D.N.Y., "R. Kelly" Convicted of All Counts by a Federal Jury in Brooklyn (Sept. 27, 2021), <https://www.justice.gov/usao-edny/pr/r-kelly-convicted-all-counts-federal-jury-brooklyn> [https://perma.cc/QU38-VSGA].

⁴¹⁵ *Id.*; Shauneen Miranda, *R. Kelly Is Going On Trial in Chicago After Being Convicted in New York*, NPR (Aug. 15, 2022, 5:00 AM) <https://www.npr.org/2022/08/15/1117391540/r-kelly-federal-trial-chicago> [https://perma.cc/9YPA-JPYS].

⁴¹⁶ Miranda, *supra* note 415; Mariah Haas & Julius Young, *R. Kelly Charged with Soliciting a Minor in Minnesota*, FOX NEWS (Aug. 5, 2019, 6:01 PM), <https://www.foxnews.com/entertainment/r-kelly-accused-of-soliciting-minor-in-minnesota> [https://perma.cc/Y9XU-RX3L].

⁴¹⁷ *Indictments Against R. Kelly List 4 Victims*, ASSOCIATED PRESS (Feb. 23, 2019), <https://apnews.com/article/48bac5195cc94a069b8af7aad7d52138> [https://perma.cc/Q2VN-S78L].

⁴¹⁸ Patrick Smith, *R. Kelly Charged With 11 New Counts of Sexual Assault and Abuse*, WBEZ CHICAGO (May 30, 2019, 3:29 PM), <https://www.wbez.org/stories/r-kelly-charged-with-new-counts/e6927c03-698e-432c-87af-6e2510f81b40> [https://perma.cc/3DRD-5T3B]; Jon Blistein, *R. Kelly Charged With 11 More Counts of Sexual Assault*, ROLLING STONE (May 30, 2019), <https://www.rollingstone.com/music/music-news/r-kelly-charged-11-counts-sexual-assault-842381> [https://perma.cc/X9WB-PKQE].

lines.⁴¹⁹ According to both indictments, while touring the country during his performances, Kelly and his entourage, which included a network of managers, handlers, and drivers, would recruit girls for Kelly to rape.⁴²⁰ As discussed *supra*, in Part II, Section B, the additional pressure RICO brings to a defendant is the admission of evidence involving the conduct of others that the jury will use to assess the defendant.⁴²¹ Kelly was taken into custody and did not receive bail, placing additional pressure on Kelly to accept a plea.⁴²² In 2021, Kelly was convicted of all counts in the federal case in the Eastern District of New York, and in 2022 he was sentenced to thirty years in federal prison.⁴²³ In a federal trial in Chicago in 2022, Kelly was convicted of three of five counts of entice of a minor to engage in criminal sexual activity and three of four counts of production of child pornography.⁴²⁴ As of this writing, Kelly's state charges in Illinois were dropped while Minnesota's charges are pending but may also be dropped considering his federal convictions.⁴²⁵

As for the case involving Black ministers, the Northern District of Ohio boasted about its seized prey. On its department website, the United States Attorney for the Northern District of Ohio proclaims, “[a]dults in a position of trust taking advantage of children for their own sexual gratification is beyond reprehensible.”⁴²⁶ In an eleven-count indictment, the federal government charged all three Black male ministers with sex trafficking three

⁴¹⁹ Indictment at 4–16, *United States v. Kelly et al.*, No. 19-CR-000567 (N.D. Ill. July 11, 2019), available at <https://www.justice.gov/usao-ndil/press-release/file/1182181/download> [<https://perma.cc/E4Z2-DCUK>] [hereinafter N.D. Ill. Indictment]; Superseding Indictment at 1–23, *United States v. Kelly*, Cr. No. 19-00286 (E.D.N.Y. July 10, 2019), available at <https://www.justice.gov/usao-edny/press-release/file/1182201/download> [<https://perma.cc/L3AV-QFLX>] [hereinafter E.D.N.Y. Superseding Indictment].

⁴²⁰ See *United States v. Kelly*, 609 F. Supp. 3d 85, 105–06 (2022); Press Release, U.S. Att’y Off., *supra* note 414; N.D. Ill. Indictment, *supra* note 419, at 4–16.

⁴²¹ Rosenberg, *supra* note 240; *Complicit Bias*, *supra* note 221, at 180–81.

⁴²² E.D.N.Y. Superseding Indictment, *supra* note 419, at 1–23.

⁴²³ Andrew Limbong et al., *R. Kelly is Sentenced to 30 Years in Prison*, NPR (June 29, 2022, 4:49 PM), <https://www.npr.org/2022/06/29/1105551227/r-kelly-sentence-30-years> [<https://perma.cc/YVA8-4PTL>].

⁴²⁴ Sonia Moghe, *R. Kelly Convicted of Multiple Child Pornography and Enticement Charges, Acquitted on Others*, CNN (Sept. 14, 2022, 8:16 PM), <https://www.cnn.com/2022/09/14/us/r-kelly-chicago-federal-trial/index.html> [<https://perma.cc/J2WT-JMVH>].

⁴²⁵ *Chicago Prosecutor Dropping R. Kelly Sex-Abuse Charges*, CBS NEWS (Jan. 30, 2023, 9:27 PM), <https://www.cbsnews.com/minnesota/news/chicago-prosecutor-dropping-r-kelly-sex-abuse-charges> [<https://perma.cc/2N3E-77CB>].

⁴²⁶ *Third Toledo Man Indicted on Federal Charges Including Sex Trafficking of Minors*, U.S. ATT’Y OFF., N.D. OHIO (Nov. 14, 2017), <https://www.justice.gov/usao-ndoh/pr/third-toledo-man-indicted-federal-charges-including-sex-trafficking-minors> [<https://perma.cc/ZU7A-62TC>].

minors over the course of three years. Two of the defendants received life sentences and one was sentenced to seventeen years.⁴²⁷

Unlike Epstein's co-conspirators, who eluded prosecution for years and to whom Acosta gave immunity, one of the defendants' wives received a twenty-one-month sentence for lying to federal investigators during the investigation into her husband's sex trafficking.⁴²⁸ The indictment charged the wife and her daughter with abducting the fourteen-year-old victim and threatening her not to testify.⁴²⁹ The wife was sentenced to twenty-four-months and her daughter was sentenced to forty-eight months—the maximum possible sentence for both women.⁴³⁰

The contrast between the legal process Epstein received—which included a federal declination; wildly unusual privileges while he was jailed in Florida; a defense team that dictated NPA terms to a federal prosecutor; a *de minimis* sentence; attempts to lower his offender status at the hands of prosecutors; and minimal charges in the face of copious evidence of felonious conduct—and the legal process R. Kelly and the Black ministers received for adjacent crimes is a stark example of the contrasting experiences of white and Black criminal suspects.

E. The Unchecked Power of Prosecutors

1. Acosta's Failed Attempts to Defend His Actions

In 2011, when explaining his conduct, Acosta said he was unduly pressured by Epstein's defense team, which included Jay Lefkowitz, Alan Dershowitz, Kenneth Starr, Jack Goldberger, Roy Black, former United

⁴²⁷ Christine Hauser, *Three Pastors Charged with Sex Trafficking of Children in Ohio*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/us/ohio-pastor-sex-trafficking.html> [https://perma.cc/UYJ9-AEMC]; Allison Dunn, *Former Pastor Haynes Sentenced to Life in Prison*, THE BLADE (June 27, 2019, 1:31 PM), <https://web.archive.org/web/20230219051057/https://www.toledoblade.com/local/courts/2019/06/27/former-toledo-pastor-anthony-haynes-sentenced-to-life-in-prison/stories/20190627138> [https://perma.cc/HQ8X-WYZJ].

⁴²⁸ *Ex-wife of Former Pastor Sentenced to 21 Months in Prison*, WTOL11 (June 25, 2019, 10:47 AM), <https://www.wtol.com/article/news/local/ex-wife-of-former-pastor-sentenced-to-21-months-in-prison/512-eed59c6d-c8d2-4d6f-9fc7-ef6c02ece41b> [https://perma.cc/4PSW-XT6B].

⁴²⁹ Chris Anderson, *Wife, Stepdaughter of Former Ohio Pastor Sent to Prison for Tampering with Child Sex Trafficking Investigation*, 19 NEWS (May 20, 2020, 2:21 PM), <https://www.cleveland19.com/2020/05/20/wife-stepdaughter-former-ohio-pastor-sent-prison-tampering-with-child-sex-trafficking-investigation> [https://perma.cc/7LUV-ZKVV].

⁴³⁰ *2 Sentenced for Witness Tampering in Trial of Former Toledo Pastor*, WTOL11 (May 19, 2020, 1:13 PM), <https://www.wtol.com/article/news/crime/alisa-haynes-alexis-fortune-sentenced-in-toledo-pastor-sex-case/512-678dd49f-b601-4be8-99dd-bb2cfdc71034> [https://perma.cc/FN9A-8GX4].

States Attorney Guy Lewis, and Gerald Lefcourt, all upper, ruling class white males. Journalist Julie Brown suggested other language for the arrangement between prosecutors and Epstein's lawyers: "collaboration."⁴³¹ Acosta claimed that the Florida state prosecutors threatened him with letting Epstein "walk" if DOJ failed to obtain a conviction.⁴³² Consequently, Acosta explained that obtaining a plea that involved jail time was better than no conviction at all.⁴³³ In 2019, heightened media attention and increased public scrutiny led to Acosta resigning as Labor Secretary under Trump, after the Southern District of New York arrested Epstein and the media exposed how Acosta bungled's prosecution, thereby facilitating Epstein's of abuse of girls for years.⁴³⁴ When Acosta resigned, President Trump attempted to immunize him from critique by playing the ethnicity card, stating:

You know what I know about Alex? He was a great student at Harvard. He's Hispanic, which I so admire. Because maybe it was a little tougher for him and maybe not. But he did an unbelievable job as the Secretary of Labor. That's what I know about him. I know one thing, he did a great job. And until this came up, there was never an ounce of problem with this very good man.⁴³⁵

Acosta's excuses about the absence of compelling evidence are highly contested.⁴³⁶ It bears repeating that Brown found that Acosta had at his office's disposal "[thirty-six] girls who all told the same story."⁴³⁷ The New York Times further established that there were forty victims when the deal was struck. And as the Times also revealed in a profile of Brown, "[e]arly in the process, she received a heavily redacted police report that was more than 100 pages long and mentioned more than 100 Jane Does."⁴³⁸

⁴³¹ *How a Future Trump Cabinet Member*, *supra* note 7.

⁴³² Dan Mangan & Kevin Breuninger, *Trump Labor Secretary Alex Acosta Defends Controversial Deal with 'Predator' Jeffrey Epstein as Democrats Demand Resignation*, CNBC (July 11, 2019, 8:09 AM), <https://www.cnbc.com/2019/07/10/labor-secretary-alex-acosta-holds-press-conference-on-jeffrey-epstein.html> [<https://perma.cc/D52R-5QK3>].

⁴³³ Katie Rogers et al., *Acosta Defends His Role in Brokering Jeffrey Epstein Plea Deal*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/us/politics/acosta-epstein.html> [<https://perma.cc/N66Q-RN5S>].

⁴³⁴ *He Thought He Was Untouchable*, *supra* note 3.

⁴³⁵ *Labor Secretary Alex Acosta Resignation*, C-SPAN (July 12, 2019), <https://www.c-span.org/video/?462577-1/labor-secretary-acosta-resigns-jeffrey-epstein-plea-deal-controversy> [<https://perma.cc/WFL6-MNWX>].

⁴³⁶ See *How a Future Trump Cabinet Member*, *supra* note 7.

⁴³⁷ Lithwick, *supra* note 261.

⁴³⁸ *Id.*

Barry Krischer, a prosecutor in Palm Beach at the time of the Florida case, responded to Acosta's claims that the Florida attorneys made threats to let Epstein walk by saying that Acosta was trying to "rewrite history."⁴³⁹ "I can emphatically state that Mr. Acosta's recollection of this matter is completely wrong," Krischer said.⁴⁴⁰ "Federal prosecutors do not take a back seat to state prosecutors. That's not how the system works in the real world."⁴⁴¹ Krischer added that if Acosta believed the state deal was so terrible, he should have filed a federal indictment instead of conducting "secret negotiations."⁴⁴²

Acosta claimed he feared that without a plea agreement, DOJ would be gambling with their chances at trial.⁴⁴³ What gamble? As argued *supra*, this was not a case of he said/she said. This was a case involving thirty to a hundred or more shes, all corroborating each other's stories, all telling the same story with other evidence corroborating their stories.⁴⁴⁴ At least one prosecutor had prepared an eighty-two-page prosecution memorandum and fifty-three-page indictment, demonstrating enough evidence by a probable cause standard to charge Epstein.⁴⁴⁵ As a former federal prosecutor, I know that federal prosecutions customarily obtain proof beyond a reasonable doubt, the standard at trial, before the indictment is prepared because the federal government has the luxury of choosing its cases and a part of that luxury is choosing cases with "legs," meaning it can withstand the rigors of trial. Moreover, as argued throughout this Article, Acosta had every advantage of state prosecutorial power to bring to bear.

2. Victim Blaming

The maltreatment of the victims during many sexualized violence investigations and adjudications is state-sanctioned violence, a process of revictimization. Acosta's treatment of, and public vitriol about, Epstein's victims are classic examples of victim blaming. Acosta's protestations attempted to render Epstein's pathology and his own duplicity invisible by

⁴³⁹ Robles et al., *supra* note 40.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ Tessa Berenso & Mahita Gajanan, *Labor Secretary Alex Acosta Defends His Role in Epstein Plea Deal*, TIME (July 10, 2019, 3:14 PM), <https://time.com/5623829/alex-acosta-jeffrey-epstein-press-conference> [<https://perma.cc/U8Z6-G3MY>].

⁴⁴⁴ *How a Future Trump Cabinet Member*, *supra* note 7.

⁴⁴⁵ OPR INVESTIGATION INTO THE U.S. ATTORNEY'S OFFICE, *supra* 126, at 25.

shifting the blame from the perpetrator to the victims.⁴⁴⁶ Acosta has never fully explained to the public why he ostensibly believed it was in the best interests of Epstein's victims and their parents to deliberately hide the NPA from them while telling them to be patient; why the FBI investigation of Epstein was terminated, particularly when the investigation was yielding more victims and evidence of sex trafficking;⁴⁴⁷ why known and unknown co-conspirators were immunized from prosecution in perpetuity; or why the search warrants of Epstein's computers were returned without execution,⁴⁴⁸ particularly when the search warrants of his computers in New York revealed troves of child pornography.⁴⁴⁹

Acosta abdicated his role as a State functionary at the height of the #MeToo movement. Instead of seizing an opportunity to close the gap of under prosecuted sexualized violence and support child victims of rape, Acosta surrendered the reins of authority to Epstein's attorneys. When Acosta attempted to justify his acquiescence to an unprecedented NPA with a sex trafficker, Acosta chose to engage in victim blaming. Acosta said, "and as for a message to the victims, the message is—you need to come forward."⁴⁵⁰ This is classic victim blaming of the first order. At the time Epstein's attorneys dictated the terms of the NPA to Acosta, approximately thirty victims had been identified and between thirty and eighty girls had come forward, and yet Acosta still blamed these victims.⁴⁵¹

"[V]ictim blaming renders the pathology of the perpetrator invisible because it removes accountability from the perpetrator and shifts blame onto the victim."⁴⁵² Instead of admitting that he was not acting in the best interests of the victims, Acosta shifted the blame from Epstein onto the girls he exploited and trafficked. Victim blaming normalizes exploitation and directly

⁴⁴⁶ Victim blaming is a fundamental precept of hegemony because it explains societal order as the fault of its victims.

⁴⁴⁷ *He Thought He Was Untouchable*, *supra* note 3.

⁴⁴⁸ *Timeline of Jeffrey Epstein's Legal Troubles*, *supra* note 120.

⁴⁴⁹ Watkins, *supra* note 157.

⁴⁵⁰ Mike Brest, *Acosta tells Epstein accusers they 'need to come forward'*, WASH. EXAM'R (July 10, 2019, 3:58 PM), <https://www.washingtonexaminer.com/news/acosta-tells-epstein-accusers-they-need-to-come-forward> [<https://perma.cc/AN9M-LJA3>].

⁴⁵¹ David A. Graham, *Instead of an Apology, Acosta Offers Epstein's Victims Implicit Blame*, ATLANTIC (July 10, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/alex-acosta-blames-victims-reticence-epstein-case/593713> [<https://perma.cc/SH9G-86N9>] ("Early in the process, [Julie Brown] received a heavily redacted police report that was more than 100 pages long and mentioned more than 100 Jane Does." Brown began working from that list and produced the series of stories that the federal prosecutors in New York credited with jump-starting their new charges.)

⁴⁵² *Stop Traffic*, *supra* note 9, at 149.

contributes to rape culture; Acosta's dismissive excuses and justifications for negotiating a cushy plea deal with a sexual predator illustrates this normalization.

If one accepts Acosta's insistence that he himself is blameless, the defenses he offered also demonstrate why victims have been loath to come forward against a powerful white heteropatriarch like Epstein, and why Acosta's complaint about their reticence is so galling. Far from being another example of a criminal justice system that treats the rich one way and the poor another, the federal prosecutors in Florida demonstrate that "[w]ithout proper interventions, sex trafficking cases can become ritualized spectacle, where sexualized violence as well as its accompanying investigation and adjudication convince the factfinder of the pathology of the victim and the sovereignty of the perpetrator" and revictimize the victims all over again.⁴⁵³ For the societally vulnerable victim, the investigation and adjudicative processes that should vindicate the rights of the victim become another layer of trauma and revictimization.

3. Inverted Process: Prosecutors Turn Victims into Villains and Villains into Victims

As Portia Pedro argues, embodiment dictates process.⁴⁵⁴ Epstein received a serving of process unimaginable for most suspects.⁴⁵⁵ Acosta allowed Epstein's defense team to dictate the terms of the NPA; immunized Epstein and his conspirators, known and unknown, from federal prosecution; and labeled Epstein's child victims "prostitutes." The failure to prosecute Epstein not only demonstrates systemic failures, but it also exposes the way in which prosecutors will summon the full weight of prosecutorial might to exculpate certain perpetrators of violence and to demonize certain victims, also epitomized by how white police officers who kill Black people are processed.⁴⁵⁶ When prosecutors prosecute institutional insiders like the

⁴⁵³ *Id.*

⁴⁵⁴ See generally Pedro, *supra* note 15 (arguing identity dictates process).

⁴⁵⁵ Levine, *supra* note 201, at 757.

⁴⁵⁶ I have written two law review articles that demonstrate the ways in which prosecutors use the criminal legal process to exculpate white officers who killed black people and simultaneously demonized the victims. See *Biased and Broken Bodies of Proof*, *supra* note 187, at 610–11 (examining the prosecution's repeated failure to challenge the testimony of officer Darren Wilson during his grand jury trial for the killing of Michael Brown, "add[ing] legitimation to Wilson's perception of Brown as demonic, aggressive, hostile, and crazy"); Blanche Bong Cook, *Something Rots in Law Enforcement and It's the Search Warrant: The Breonna Taylor Case*, 102 B.U. L. REV. 1, 66 (2022) ("[P]olice and prosecutors . . . constitute a fraternity dedicated to protecting the thin blue line. When law enforcement investigates itself, the inherent conflict of interest is reflected in the lack of integrity of the facts gathered and a fundamental lack of clarity about what happened.").

police, or favored sons and fair-haired beauties like Epstein, the “normal” prosecutorial process becomes inverted, and villains become victims and victims become villains.⁴⁵⁷

To further illustrate the point of inversion for institutional insiders, the correspondences, letters, and emails between the prosecution and Epstein’s defense attorneys have provided a “behind the scenes view” into plea negotiations when the defendant is a favored son.⁴⁵⁸ These letters and emails expose an unprecedented level of collaboration between federal prosecutors and Epstein’s defense attorneys, a highly unorthodox collusion.⁴⁵⁹ As a former federal sex trafficking prosecutor, I can attest that *Epstein* is remarkable. “The damage that happened in this case is unconscionable,” said Bradley Edwards, a former state prosecutor who represents some of Epstein’s victims.⁴⁶⁰ “How in the world do you, the U.S. attorney, engage in a negotiation with a criminal defendant, basically allowing that criminal defendant to write up the agreement?”⁴⁶¹ Far from being a heartfelt effort to help the victims, Edwards has further commented, “The conspiracy between the government and Epstein was really ‘let’s figure out a way to make the whole thing go away as quietly as possible.’”⁴⁶²

At a bare minimum, allowing private parties to dictate the terms of a child sex trafficker’s freedom leads to what Kate Levine labels a “serious optics problems.”⁴⁶³ The marijuana dealer, serving a sentence of five to fifteen years, is left watching the legalization of marijuana to the benefit of

⁴⁵⁷ *Biased and Broken Bodies of Proof*, *supra* note 187, at 570; see also Abby Goodnough, *Questions of Preferential Treatment Are Raised in Florida Sex Case*, N.Y. TIMES (Sept. 3, 2006), <https://www.nytimes.com/2006/09/03/us/03epstein.html> [<https://perma.cc/JSK7-PBE7>] (“In an editorial, The Palm Beach Post attacked Mr. Krischer, a Democrat whose post is elective, saying the public had been left ‘to wonder whether the system tilted in favor of a wealthy, well-connected alleged perpetrator and against very young girls who are alleged victims of sex crimes.’”).

⁴⁵⁸ *How a Future Trump Cabinet Member*, *supra* note 7.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.* It is interesting to note that Democratic Senator Dianne Feinstein hinted at the inversion process. When Trump nominated Acosta as Labor Secretary in 2017, Acosta was questioned about *Epstein* during Acosta’s Senate confirmation hearing. In opposing Acosta for Labor Secretary, Senator Feinstein noted that “his handling of a case involving sex trafficking of underage girls when he was a U.S. attorney suggests he won’t put the interests of workers and everyday people ahead of the powerful and well-connected.” Press Release, Dianne Feinstein, Feinstein Opposes Acosta Nomination (Apr. 26, 2017), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=B7A0820B-281D-45C8-BC18-CEE0F3AF5D1B> [<https://perma.cc/E75T-AP2G>].

⁴⁶³ Levine, *supra* note 201, at 768–69.

rich white male marijuana distributors alongside recidivist child rapist Epstein whom prosecutors failed to prosecute at all.⁴⁶⁴ The oversurveilled and hyperincarcerated societally vulnerable see police getting away with flagrantly killing Black people in broad daylight while being filmed.⁴⁶⁵ Defense attorneys and defendants see Epstein getting pre-charge procedural advantages they could not dream of.⁴⁶⁶ This two-tiered system of process, namely freedom and liberty for the powerful and death and destruction for the vulnerable, makes cries for abolition far from hysterical, but perhaps, measured responses to a system that is rigged in favor of white heteropatriarchs at best, and rotten to the core at worst.⁴⁶⁷

The cases involving Michael Brown, Eric Gardner, Tamir Rice, and Breonna Taylor (to name only a few), all Black people shot by white police officers, have become the means by which prosecutors use the adjudicatory

⁴⁶⁴ April M. Short, *Legal Weed's Race Problem: White Men Get Rich, Black Men Stay in Prison*, SALON (Mar. 14, 2014, 12:50 PM), https://www.salon.com/2014/03/14/legal_weeds_race_problem_white_men_get_rich_black_men_stay_in_prison_partner [https://perma.cc/X599-L5EJ] (quoting Michelle Alexander stating, "Here are white men poised to run big marijuana businesses, dreaming of cashing in big—big money, big businesses selling weed—after 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed. Now, white men are planning to get rich doing precisely the same thing?").

⁴⁶⁵ Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> [https://perma.cc/HU7S-P6M8] (describing that neighbors recorded video of the body of Michael Brown, a Black man, face down in the middle of the street after he was shot dead by a white police officer just after noon); Mark Berman, *Investigations, Outrage Follow Police Chokehold and Eric Garner's Death*, WASH. POST (July 21, 2014, 5:02 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/07/21/investigations-outrage-follow-police-chokehold-and-eric-garners-death> [https://perma.cc/2AQT-CGLU] (describing that a video recorded by a bystander shows the killing of Eric Garner, a Black man who was placed in a chokehold by a white police officer in broad daylight); Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-year-old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014, 10:00 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy> [https://perma.cc/A52D-7CXJ] (describing that surveillance video shows white police shooting and killing Tamir Rice, a Black 12-year-old boy, in broad daylight within seconds of arriving on the scene); Mark Berman & Wesley Lowery, *Video Footage Shows Minn. Traffic Stop That Ended with Philando Castile's Death*, WASH. POST (June 20, 2017, 5:40 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/20/video-footage-shows-minn-traffic-stop-that-ended-with-philando-castiles-death> [https://perma.cc/BR33-38GK] (describing that police dashcam video shows a white police officer shooting and killing Philando Castile, a Black man, during an evening traffic stop; Castile's girlfriend also livestreamed the moments following the shooting on Facebook); Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1188 (2013); Levine, *supra* note 201, at 769.

⁴⁶⁶ Levine, *supra* note 201, at 768–69.

⁴⁶⁷ Thusi, *supra* note 14, at 800.

procedure, particularly grand jury proceedings, to exculpate criminal suspects they lack the desire to prosecute.⁴⁶⁸ In these cases, prosecutors proceed with the power and moral authority to turn investigations and indictment proceedings into a vindication process. The adjudication process thus becomes a means of solidifying narratives of white innocence and Black demonry. By way of example, instead of investigating whether white police officer Darren Wilson used excessive police force in killing young Black male Michael Brown, the adjudicative proceedings vilified Brown and sanitized Wilson, immunizing him from charges of criminality and treachery.⁴⁶⁹

These are just a few examples that demonstrate the inverted process in which prosecutors become defense attorneys, defendants become victims, and victims become villains. In gendered and sexualized violence cases, like rape cases, domestic violence, sex trafficking, and other cases involving societally vulnerable victims, the adjudication process sometimes confirms the perpetrator's innocence and the victim's villainy.⁴⁷⁰ This is how the criminal legal process creates a material reality in which innocence attaches to powerful bodies and demonry to societally vulnerable ones—exoneration for Epstein, hyperincarceration for Black men, and lack of vindication for girls subjected to sexual assault. This is also how prosecutors, and law enforcement generally, construct race, gender, and class.⁴⁷¹

White heteropatriarchy creates the world in which all of this is possible. As Levine argues, when prosecutors prosecute the police, normally zealous prosecutors become weak in the knees. As she states:

When they are charging or indicting an ordinary suspect, the context of the crime, the criminogenic factors that led to it, and the harm to the defendant's reputation, family, and life are not factors that outweigh a prosecutor's goals to charge and eventually convict when they can. These motivations, however, are upended when a police officer's life is on the line: prosecutors work closely with the police, rely on them for every case they try, and their relationships may bleed from professional to social. In other words, they are looking at a police suspect with a world of context and understanding that is simply missing when an ordinary suspect is before them.⁴⁷²

⁴⁶⁸ Levine, *supra* note 201, at 756.

⁴⁶⁹ *Biased and Broken Bodies of Proof*, *supra* note 187, at 570.

⁴⁷⁰ *Id.* at 570–71.

⁴⁷¹ Thusi, *supra* note 14, at 800.

⁴⁷² Levine, *supra* note 201, at 771.

The same observations are true for Epstein, a different kind of institutional insider, whose wealth and privilege connect him to the prosecutors charged with investigating and adjudicating his case.

IV. JEFFREY EPSTEIN: A CASE STUDY FOR ABOLITION

A growing number of Black legal scholars reject the notion that prosecutors can self-monitor to reduce racial discrimination in their administration of justice.⁴⁷³ Several scholars have argued that the system is so pervasively putrid that nothing less than a massive overhaul is warranted.⁴⁷⁴ As a result, they reject incremental changes or tweaks to our current criminal legal process.⁴⁷⁵ This final part makes three claims: (1) The distribution of premature death in vulnerable communities and life and liberty for white heteropatriarchs make calls for abolition far from hyperbolic or hysterical; rather, such demands are rational responses to a grossly disparate system. At a bare minimum, (2) greater transparency in the prosecutorial function is needed along with (3) implicit bias training. Transparency combined with implicit bias training will make a dent in disparate prosecutorial decision-making until such time that we engage a fundamental overhaul.⁴⁷⁶

Thusi argues, “The politics of prosecution is pathological in its Whiteness.”⁴⁷⁷ In addition to whiteness, Epstein illustrates that class, race, and gender are operative norms that not only facilitate disparate outcomes but are pervasive throughout the system. As a result, any efforts to rectify the problems must be as large and multifaceted as the problem itself.⁴⁷⁸ Like the refusal to hold police accountable when they kill Black people, the failure to prosecute Epstein is a final nail in the coffin of the prison industrial complex and intensifies the abolitionist call. Epstein becomes an exhibit in the losing legitimacy of the criminal legal process.

⁴⁷³ Thusi, *supra* note 14, at 806.

⁴⁷⁴ Thusi, *supra* note 14, at 869; Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 87 (2014); Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That Is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 FORDHAM URB. L.J. 625, 679 (2021); Allegra M. McLeod, *Emvisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1633 (2019).

⁴⁷⁵ Thusi, *supra* note 14, at 869; Meyn, *supra* note 474, at 87; Jefferson-Bullock & Exum, *supra* note 474, at 679; McLeod, *supra* note 474, at 1633.

⁴⁷⁶ Melba V. Pearson, *Data as a Tool for Racial Justice*, 36 CRIM. JUST. 4, 4–5 (2021).

⁴⁷⁷ Thusi, *supra* note 14, at 870.

⁴⁷⁸ *Biased and Broken Bodies of Proof*, *supra* note 187, at 612 (“Any solutions to the problem of white heteropatriarchal omnipresence, entrenchment, and inevitability must be as equally robust and comprehensive as the problem of white heteropatriarchy itself.”).

At a minimum, the prosecutorial function and work of prosecutors must be subject to the precious antiseptic light of day.⁴⁷⁹ The data demonstrates that the idea that law enforcement can be trusted is a nonstarter. In 1998, Angela J. Davis argued that the primary responsibility for reducing harm to Black defendants rests with prosecutors, especially in the context of the structural racism that pervades law enforcement: “Prosecutors should bear the brunt of the remedial responsibility to eliminate racism in the criminal process, even though inappropriate or illegal considerations of race may occur at the arrest stage, often before prosecutorial participation in the process.”⁴⁸⁰ Davis called for racial impact studies that are published and available to the public.⁴⁸¹ Twenty-five years later, Davis assessed the Prosecution and Racial Justice (PRJ) Program of the Vera Institute of Justice, which follows that practice.⁴⁸² The program collects data on all cases in a prosecutor’s office and uses regression analysis to determine whether racial bias influences the legal outcomes.⁴⁸³ Prosecutors from one office that participated in the program were “surprised” to learn that they were prosecuting ninety-seven percent of all drug cases but were prosecuting only seventy percent of cases overall.⁴⁸⁴ This was in part attributable to lack of oversight of law enforcement behavior: “The Assistant District Attorneys had been adopting the police officer’s charging recommendations in 98.9% of the cases, and 70% of the defendants charged were people of color.”⁴⁸⁵ In another office that partnered with PRJ, the data showed that prosecutors were relying on prior criminal records when they made charging decisions and that this method “had a significant impact on racial disparities for certain offenses.”⁴⁸⁶ Davis argues that a “prosecutor armed with this knowledge is in a much better position to make a decision about whether the disparities are unfair and unwarranted and what policies she might implement to reduce the disparities.”⁴⁸⁷

⁴⁷⁹ *Id.*

⁴⁸⁰ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 31 (1998); Thusi, *supra* note 14, at 870.

⁴⁸¹ *Prosecution and Race: The Power and Privilege of Discretion*, *supra* note 480, at 31.

⁴⁸² Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y*, 821, 823 (2013).

⁴⁸³ *Id.* at 823–24.

⁴⁸⁴ *Id.* at 838.

⁴⁸⁵ *Id.* at 845.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*; see also Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 *AM. CRIM. L. REV.* 1541, 1543 (2012).

Epstein demonstrates the need for transparency and robust data sharing in prosecutorial offices. The prosecutorial declinations and the demographics of those prosecuting and doing the prosecuting should be made available to the public on the websites of each individual prosecutor's office and collected nationwide by DOJ. Just as some prosecutors' offices use their websites to hang trophies of their prey, they should be equally proud of the race and gender of each of the defendants and alleged victims, as well as the crimes with which they have been charged in addition to the race and gender of each person working in the office, all made readily accessible to the public on the office website. Each office should make the race, class, and gender demographics of arrests, charges, indictments, plea bargaining, and sentences available to the entire public as well as the demographic information of the persons making prosecutorial decisions and the victims. This kind of data gathering and sharing would lend itself to much needed public scrutiny and scholarly inquiry.

Many critics argue that such publicly available information would serve the purpose of police cameras: do nothing about the problem but just film it. Still, the prosecutorial function must be subjected to rigorous public scrutiny. Had it not been for the public outcry facilitated by the stellar journalism of Julie Brown, there may never have been any prosecution of Epstein or his known and unknown co-conspirators. All too often, prosecutors' offices are hiding behind a "black box,"⁴⁸⁸ a wall of secrecy, refusing to reveal or admit the underlying norms of whiteness, white supremacy, and white heteropatriarchy.⁴⁸⁹ Taking a data driven demographic approach would expose the obfuscated norms.⁴⁹⁰

A combination of awareness through transparency and training could have some impact on the current disparities. Part of the privilege of white heteropatriarchy is its invisible nature and its ability to obfuscate and thwart detection, punishment, sanction, and correction. When white heteropatriarchy is unmasked and laid bare, particularly through public shaming, it is forced to grapple with its pathology.⁴⁹¹ This is not to suggest that discrete corrective measures would cure the entire problem, but until abolitionism is embraced, incremental changes remain necessary. Significant

⁴⁸⁸ Levine, *supra* note 201, at 756 (citing generally Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008)).

⁴⁸⁹ Melissa Boughton, *Wilson Center's New Partnership with District Attorneys Will Shed Light on Plea Agreements*, DUKE L. NEWS (July 15, 2021), <https://law.duke.edu/news/wilson-centers-new-partnership-district-attorneys-will-shed-light-plea-agreements> [https://perma.cc/VUF7-BLK3].

⁴⁹⁰ Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1459 (2021).

⁴⁹¹ *Biased and Broken Bodies of Proof*, *supra* note 187, at 622.

data demonstrates that implicit bias is a habit that can be unlearned through awareness, concern about the effects of that bias, and the application of strategies to reduce bias.⁴⁹² Individuals can only work to correct sources of bias that they are aware exist.⁴⁹³ Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt law enforcement to pursue remedial action.⁴⁹⁴ Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place, it is a critical starting point.⁴⁹⁵

CONCLUSION

The intertwined and enmeshed race, class, and gender privilege of Epstein, his defense attorneys, and the prosecutors dictated the outcome, Epstein's liberty. Acosta abdicated his role as a State agent, surrendered his authority to Epstein's attorneys, allowed Epstein's attorneys to dictate the terms of Epstein's freedom, and licensed Epstein and many others to continue raping children in his lush West Palm Beach offices and around the world. White heteropatriarchy has the power to not only dictate process, but to invert it. White heteropatriarchy has the force to morph child rapists into victims and victims into "child prostitutes." The exoneration of Epstein served the same function as the sexualized violence itself—the exploitation and vilification of the victim, the overvalorization or hypervalorization of the assailants, and the reassurance of white heteropatriarchal order, entitlement, and preeminence.⁴⁹⁶

⁴⁹² Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267, 1267 (2012). More explicit types of training also have very promising effects. For instance, subjects who undergo forty-five minutes of intensive practice at rejecting stereotypes—clicking “No” when viewing a black face paired with a stereotypical description—showed a resulting reduction in implicit bias. See generally Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCH. 871, 871 (2000). Researchers liken the training (which cannot be accomplished more quickly) to practicing a new physical skill. *Id.* (discussing how this training could be similar to the learning of any other new skill); see also PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 8 (2018).

⁴⁹³ Devine et al., *supra* note 492, at 1267.

⁴⁹⁴ *Strategies to Reduce the Influence of Implicit Bias*, NAT'L CIR. FOR STATE CTS. 5 (2012) https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf [<https://perma.cc/TE6T-G6XY>] (citing to Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED., 1231, 1231–38 (2007)).

⁴⁹⁵ *Id.*

⁴⁹⁶ *Stop Traffic*, *supra* note 9, at 150.

Despite Acosta's claims to the contrary, there was an abundance of evidence pending against Epstein. Law enforcement had identified over 100 of Epstein's victims. At the time of the NPA, prosecutors labored under supervisory mandates urging zealous prosecution. The Supreme Court and other courts had fashioned structural advantages for the prosecution the likes of which directly contribute to the unprecedented carcerality of the United States, leader of the world in imprisonment. Federal prosecutors actively engage conspiracy and RICO charges along with a medley of other prosecutorial advantages, particularly when the suspects are Black. The successful prosecutions against R. Kelly and the three Black ministers in Ohio are paradigmatic of the effectiveness of federal prosecutors when there is a will to prosecute.

The point of this article is not to endorse carcerality. Rather, the aim of this article is to answer India Thusi's call to engage in an intersectional analysis of pathology within the ranks of prosecutors. This article applies an intersectional lens on the failure to prosecute Epstein and historically contextualizes *Epstein* in an era of mass incarceration and hyper-underprosecution of sexualized violence, out of which a two-tiered system of process emerges: liberty for white heteropatriarchs and death and destruction for racialized communities. Once this schism is unmasked the cries for abolition lack hysteria and hyperbole; rather, they are rational responses to a highly flawed system, at best, or rotten to the core at worst. The prospect of tweaking such a highly flawed system has severe limitations; however, at a minimum, greater transparency of the prosecutorial function along with training are fundamentally necessary to a vexing moral crisis.