INTERSECTIONALLY-INFORMED ADVOCACY:
A Structural Justice Account of Wrongful Convictions for Sexual Violence

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INTRODUCTION

On August 24, 2020, the Fourth Circuit Court of Appeals found that Ronnie Long, a Black man who had spent 44 years in prison for raping a white woman, was likely innocent.[1] Because police wrongfully suppressed DNA and fingerprint evidence, Long's case was vacated and the governor pardoned him.[2] Long's case is not unique.[3] According to the National Registry of Exonerations, nearly 400 men of color were wrongfully convicted for sexual assault between 1989–2024, and these are just the known cases.[4] Similarly, The Innocence Project's catalogue of those who were wrongfully convicted of sexual assault consists predominantly of men of color.[5]

1. *See* Long v. Hooks, 972 F.3d 442, 446, 471 (4th Cir. 2020) (vacating the district court's dismissal of Ronnie Long's petition and remanding with consideration of actual innocence).

2. *See id.* at 465–71; *see also* The Associated Press, *North Carolina Man Settles for Millions After Wrongful Conviction, 44 Years in Prison*, N.P.R. (Jan. 10, 2024, 1:07 AM), https://www.npr.org/2024/01/10/1223886402/north-carolina-man-settles-millions-after-wrongful-conviction [https://perma.cc/5WNW-HC9G].

3. *See* THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/A3PK-C4TP] (last visited Jan. 6, 2022); *see also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 45–48 (2011) (discussing Jenkins v. Scully, No. 91-CV-298E, 1992 WL 205685 (W.D.N.Y. July 16, 1992), and explaining how Habib Wahir Abdal, a Black man also known as Vincent Jenkins, was wrongfully convicted of rape and spent sixteen years in prison).

4. *Browse Cases: Detailed View*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?SortField=Race&View=%7Bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7D&FilterField1=Crime&FilterValue1=8%5FSexual%20Assault&SortDir=Desc [https://perma.cc/3MXM-7HR2] (last visited June 17, 2024).

5. *See All Cases (Sex Crimes)*, THE INNOCENCE PROJECT, https://innocenceproject.org/all-cases/ [https://perma.cc/6FCN-4W72] (last visited June

In fact, of the 163 cases of sex crime exonerees (all but two of whom were men), 97 were Black men and 13 were Latino men, while only fifty-one were white men.[6]

As of 2024, a total of 3,489 people, the majority of whom are men of color, have been wrongfully incarcerated and subsequently lost over 31,700 years of freedom to incarceration.[7] So, how just can the criminal justice system really be? The overwhelming number of false convictions involving men of color is a symptom of the United States' alarming rate of incarceration, which is six to ten times greater than other nations in similar socioeconomic positions.[8] The incarceration rate in the United States is much higher than that of other nations not because the United States is inherently more crime-riddled, but because the nation maintains a unique tradition of using incarceration as a method of social and political control over communities of color.[9] According to activist and legal scholar Michelle Alexander, the history of the United States is defined by a series of adaptations aimed at preserving a racial caste system in which communities of color—particularly Black communities—are locked into a lower sociopolitical position than white communities.[10]

Alexander's claims about a racial caste system are evident in the disproportionately high wrongful conviction rates of men of color for sex crimes.[11] While numerous activists have brought attention to this caste problem, their work tends to focus on the impact that racism has on eyewitnesses, police, and prosecutorial conduct toward wrongfully accused individuals.[12] Activists identify

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17, 2024).

6. *Id.*

7. *The National Registry of Exonerations*, *supra* note 3.

8. *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Era of Colorblindness 7–8 (2010).

9. *See id.* at 21–58. What began as the enslavement of Africans, the attempted genocide of Indigenous peoples, the internment of Asian Americans, and caging of Latinx migrants, has become continued control of Black, Indigenous, Asian, and Latinx people through deliberate criminalization and over-policing, justified by the War on Drugs and zero-tolerance policies at the border. *Id.*

10. *See id.* at 21 ("Since the nation's founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form . . . a new form of racialized social control begins to take hold.").

11. *See Browse Cases: Detailed View*, *supra* note 4; *see All Cases (Sex Crimes)*, *supra* note 5.

12. *See*, *e.g.*, Samuel R. Gross et al., *Race and Wrongful Convictions in the United States Report*, Nat'l Registry of Exonerations (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/CKS9-GURJ].

how racism operates *after* a suspect of color has been identified.[13] Missing from this conversation is how racism and other forms of discrimination operate against the actual survivors of sexual violence *before* a suspect is identified.[14]

This Article argues that the criminal justice system's failures to support sexual violence survivors is contributing to the high wrongful conviction rates of men of color for sex crimes.[15] To support this argument, this Article uses intersectionality and women of color structural feminisms as theoretical frameworks to reveal the unique roles that sexism, racism, and other forms of discrimination play in the legal processing of sexual violence cases.[16] Part I briefly clarifies key terms, assumptions, and limitations referenced throughout this Article.[17] Part II presents background information regarding wrongful convictions of men of color for sexual violence and the present solutions for addressing this issue.[18] Part III defines intersectionality from a critical legal standpoint.[19] Part IV presents background information regarding who the "ideal victim" of sexual violence is and how this myth of an ideal victim pervades each stage of the criminal justice system's treatment of survivors.[20] Part V analyzes how the intersecting forms of discrimination exacerbate the barriers to justice for those who do not present as "ideal victims" and contribute to wrongfully convicting men of color.[21] This analysis demonstrates the structured oppression that operationalizes Alexander's racial caste system as the primary function of the criminal justice system.[22] In Part VI, this Article argues that addressing the problem of wrongful convictions for men of color requires dismantling discriminatory barriers to justice for sexual violence survivors.[23] Ultimately, to prevent more men of color from being

13. *See id.*
14. *See id.*
15. *See infra* Part VI. For clarification, this Article refers only to adult survivors of sexual violence. Sexual violence against children is prevalent and also skewed toward marginalized children, but due to the added complexities surrounding child survivorhood, this Article focuses on adults.
16. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1241–99 (1991); *see also* Elena Ruíz y Flores, Women of Color Structural Feminisms, in The Palgrave Handbook on Critical Race & Gender 167, 171 (Shirley-Anne Tate ed., 2022).
17. *See infra* Part I.
18. *See infra* Part I.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part V.
22. *See id.*; *see also* Alexander, *supra* note 8.
23. *See infra* Part VI.

wrongfully convicted of sex crimes, the legal system's mistreatment of sexual violence survivors must first be addressed.[24]

I. Defining the Scope of the Problem

The criminal justice system disproportionately underserves survivors of sexual violence compared to victims of other types of crimes.[25] For every 1,000 cases of sexual assault, only 25 perpetrators, or 2.5 percent, will be incarcerated, as compared to other types of violent crimes like assault and battery.[26] That said, the utility of this statistic is debatable because incarceration is not necessarily the best measure of justice being served for sexual violence survivors.[27]

In fact, though beyond the scope of this Article, it is worth noting that philosophers and activists like Alisa Bierria and Mimi Kim argue against a notion of justice for survivors that relies on a punitive carceral system.[28] They and other women of color activists advocate for restorative justice efforts that focus on the survivor and community healing rather than on punishing the perpetrator.[29] For example, Indigenous legal scholar Sarah Deer contends that sexual violence law is a method of colonial violence against Indigenous sovereignty, so instilling and measuring justice must be decolonial, tribally-led, anti-carceral, and survivor-centered.[30]

While low incarceration statistics may not reflect the kind of justice survivors need and want, the low number does indicate, at a minimum, that few perpetrators are found and removed from the

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24. *See infra* Part VI.

25. *See* Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 Violence Against Women 145, 146, 157 (2012).

26. *See* RAINN *The Criminal Justice System: Statistics*, https://www.rainn.org/statistics/criminal-justice-system [perma.cc/99VU-7JHD] (last visited June 17, 2024) (finding that of 1,000 assault and battery crimes, 33 criminals will be incarcerated).

27. *See* Alisa Bierria & Mimi E. Kim, *Community Accountability: Emerging Movements to Transform Violence*, 37 Soc. Just. 1, 5 (2012) ("Community accountability and community-based approaches challenge us to seriously address violence and intimate harms without reproducing the technologies of individualization, pathology, penalty, protection under the authority of heteropatriarchy and white supremacy, and criminalization, all of which continually deny and subvert our notions of safety and justice.").

28. *See id.*

29. *See*, *e.g.*, *Black Feminist Rants: Episode 2: Loretta Ross*, Black Feminist Rants at 29:08 (July 8, 2020), https://anchor.fm/lakia-williams8/episodes/Ep—2-Loretta-Ross-egfj6f [perma.cc/NS28-NLMY].

30. *See* Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, Wicazo SA Rev. 149–67 (2009).

public where they may continue to assault.[31] The low number of incarcerations for sexual violence in proportion to the crime's prevalence is therefore one example of how the criminal justice system is underserving survivors.[32]

Another statistical limitation of incarceration data is the way that language can be underinclusive or, at the same time, overbroad so as to ignore key differences.[33] For example, most of these data sets only categorize incarceration rates based on two genders: cisgender men and cisgender women. However, transwomen experience sexual violence at higher rates than ciswomen, so statistics should recognize the differences between trans and ciswomen without hiding these differences under the overbroad, general category of women.[34] At the same time, transwomen are women, and continuing to separate transwomen's experiences from ciswomen's experiences can reproduce the discriminatory belief that ciswomen are the standard from which transwomen, intersex people, and others deviate.[35] Thus, the term women is inclusive of transwomen in this Article unless otherwise specified.[36]

In the same way that this Article carefully uses broad terms like women, categories like men of color and women of color refer to a collective of people who share racialized and gendered experiences, but who also have racialized differences among subcommunities.[37] For example, Black women experience sexual assault at different rates than Asian women, Latinx women, Middle Eastern women,

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31. *See Scope of the Problem: Statistics*, *supra* note 26.

32. *See id.*

33. *See*, *e.g.*, Anne Schulherr Waters, *Language Matters: A Metaphysic of NonDiscreet NonBinary Dualism*, Am. Phil. Ass'n Newsletter on Am. Indians in Phil. 1, 1–14 (2001).

34. *See* MeTooMovement, *Statistics: LGBTQIA+*, https://metoomvmt.org/learn-more/statistics [perma.cc/JXJ6-EDJA] (last visited June 17, 2024).

35. *See* Carol Hay, *Who Counts as a Woman?*, N.Y. Times (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/opinion/trans-women-feminism.html [perma.cc/C5MB-RX3D] ("The attempt to exclude trans women from the ranks of women reinforces the dangerous idea that there is a right way to be female.").

36. *See id.* This Article also avoids using gendered pronouns because people who identify as women may not use she/her/hers pronouns. Additionally, intersex and nonbinary people may be perceived and publicly or legally treated as female, but may not use traditional female pronouns. Furthermore, while not the focus of this Article, men also experience sexual violence.

37. *See* MeTooMovement, *Statistics: Race & Indigenous*, https://metoomvmt.org/learn-more/statistics [https://perma.cc/JXJ6-EDJA] (last visited June 17, 2024) (noting the different rates of sexual violence across different races).

and so on.[38] The term women of color as a collective category for racialized women is meant to track how racism generally affects sexual assault case law and the criminal justice system while still recognizing that racism's impact on each racialized community is not uniform for all.[39]

II. Racial Discrimination Against Men of Color In Sexual Violence Cases

The United States has a long history of targeting, over-policing, and incarcerating people of color.[40] While women are the fastest-growing incarcerated population, the vast majority of whom are women of color, most research focuses on the overincarceration of men of color.[41] That said, scholars are aware that men of color are more likely to be wrongfully convicted than any other demographic for all major crime types, but especially for sex crimes.[42] According to the National Registry of Exonerations in 2020, 203 of the 346 sexual assault exonerees are Black men, 23 are Hispanic/Latino men, and 2 are Native American men.[43] Men of color represent nearly 60 percent of all sexual assault exonerees despite the fact that the Black and Latinx communities of the United States combined (men, women, and nonbinary/gender non-conforming people) comprise only 21 percent of the United States population.[44]

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38. *See id.*

39. *See id.*

40. *See* Alexander, *supra* note 8, at 196 ("Laws prohibiting the use and sale of drugs are facially race neutral, but they are enforced in a highly discriminatory fashion. The decision to wage the drug war primarily [took place] in black and brown communities rather than white ones and [served] to target African Americans but not whites . . . . .").

41. *See* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, Prison Pol'y Initiative (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [perma.cc/4NQM-4GSW] (noting that "[w]omen have become the fastest-growing segment of the incarcerated population . . . [but] the story of women's prison growth has been obscured by overly broad discussions of the 'total' prison population for too long"); *see also* Andrea J. Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color 19 (2017) ("The history I learned in school rarely mentioned Indigenous women's experiences of colonial violence, Black women's encounters with slave patrols and Jim Crow policing, or immigrant women's experiences with policing at and beyond the border.").

42. *See The National Registry of Exonerations*, *supra* note 3. Because this data only reflects known wrongful convictions nationwide since 1989, wrongful conviction rates for women of color could be higher than the data reflects.

43. *See id.*

44. *See* Gross et al., *supra* note 12.

Subpart A explains the history of racial discrimination in the United States that has led to the high number of wrongful convictions of men of color.[45] Subpart B identifies specific actors at each stage of the criminal justice system who contribute to the high number of wrongful convictions of men of color, including eyewitnesses, police officers, judges, juries, and lab analysts.[46]

A. *A History of Racial Discrimination*

Racism perpetuates a myth where men of color are considered prone to sexual violence.[47] Black men in particular are considered sex crime perpetrators due to pervasive, harmful stereotypes like the myth of the Bestial Black Man, which categorizes "[B]lack men [as] animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape [of white women]."[48] This myth stretches back to the earliest days of chattel slavery in the United States, a time when rape and attempted rape of white women by enslaved African Americans was assigned capital punishment, but rape of African American women was not penalized.[49]

After slavery was abolished—on paper, not in practice—the myth of the Bestial Black Man persisted.[50] Public lynchings of Black men for alleged sexual advances toward white women were prolific.[51]

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45. *See infra* Subpart II.A.

46. *See infra* Subpart II.B.

47. *See* Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: The Cumulative Disadvantage Framework*, 125 Dick. L. Rev. 653, 711 (2021) (acknowledging the "societal myth of the young, Black male as the superpredator"); *see also* Lynne Henderson, *Rape and Responsibility*, 11 L. & Phil. 127, 132 (1992) ("The cultural stereotypes of rape are that rape is either committed by psychopathic armed strangers or by black men, by definition 'strangers' if they rape white woman [sic].").

48. *See* N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1320 (2004).

49. *See* Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed Through the Prism of a Modern-Day Emmett Till*, ABA (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-intersection-of-race-and-rape--viewed-through-the-prism-of-a/ [https://perma.cc/35VE-YX27] ("Rape was specifically limited to white women . . . [state] provisions mandated capital punishment for both the rape and the attempted rape of a white female by a slave.").

50. *See id.* ("[T]he most common reason for public lynching was the perception that white women needed to be protected from African American rapists and attempted rapists. Black men were painted as sexually deviant monsters.").

51. *See id.* (quoting slave-owning white suffragist and politician Rebecca Latimer Felton who said that "If it [society] needs lynching to protect [white] woman's dearest possession from the ravening human beasts [Black men], then I say lynch a thousand times a week if necessary."); *see also* Duru, *supra*

Scholars estimate that about 5,000 lynchings occurred between 1880 and 1950, which is approximately six per month during that seventy year period.[52]

At the same time that white people weaponized alleged sexual violence against Black men, white people continued to commit actual sexual violence against Black people, especially Black women and girls.[53] In response, activists like Ida B. Wells fought for anti-lynching laws, establishing a campaign that catalyzed anti-lynching legislation.[54] Despite this legislation and its increased enforcement, white people continued killing Black men for actual or alleged sexual crimes through the disproportionate enforcement of capital punishment .[55] Scholars estimate that Black men received the death penalty eighteen times more frequently when the victims were white compared to any other racial dynamic between the victim and defendant.[56] Decades later, Black men still receive longer sentences for alleged sex crimes.[57] Twenty-eight percent of Black sexual violence exonerees were sentenced to life imprisonment, and the remainder faced an average of 29 years in prison. In contrast, only 17 percent of white sexual violence exonerees faced life sentences, and the rest averaged 19 years in prison.[58]

However, not all suspects make it to the court room.[59] An indelible example of racism's violent history of wrongfully accusing Black men and boys of sex crimes against white women is the notorious 1955 case of Emmett Till, a Black fourteen-year-old boy

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note 48, at 1326–27 ("The mythical Bestial Black Man and his unrestrained sexuality proved to be at the heart of the lynching phenomenon . . . . [w]hether or not a rape had occurred, lynchings were generally justified as appropriately responsive to attacks on white womanhood and were motivated by a fear of the black man's mythical sexual savagery.").

52. *See* Hale & Matt, *supra* note 49.

53. *See id.* ("During the Jim Crow era, white men used rape and rumors of rape not only to justify violence against African American men but also to remind African American women that their bodies were not their own.").

54. *See* Tianna Mobley, *Ida B. Wells-Barnett: Anti-Lynching and the White House*, The White House Hist. Ass'n (Apr. 9, 2021), https://www.whitehousehistory.org/ida-b-wells-barnett-anti-lynching-and-the-white-house [perma.cc/ZB5X-JFYU].

55. *See* Hale & Matt, *supra* note 49 ("According to the U.S. Department of Justice, between 1930 and 1972, 455 people were executed for rape, and 405 of those were African American.").

56. *See id.*

57. *See* Gross et al., *supra* note 12, at 14.

58. *See id.*

59. *See*, *e.g.*, Hale & Matt, *supra* note 49 (detailing the tragic story of Emmett Till, a Black boy wrongfully accused and brutally murdered before trial).

who was murdered instead of brought to court after being accused of offending a white women in a grocery store.[60]

The majority of research on wrongful accusations of sex crimes focuses on Black men, but racist myths of hypersexuality and violence hold true for other men of color.[61] For example, the more recent high-profile case known as the *Central Park Five* was heavily influenced by the presumed hypersexuality and animality of Black and Latino boys.[62] These Black and Brown teenagers were swiftly and wrongfully convicted in the rape of a white jogger, Trisha Meili, in large part due to racial differences between them and Meili and the persistence of racism in the case. For example, the teenagers were convicted by an all-white jury, and the trial court instructed the jury to presume sexual acts as nonconsensual when the accused were men of color and the victim was white.[63] The legacies of the Bestial Black Man and other racist presumptions about men of color continue to influence the criminal justice system's treatment of sexual violence cases as mentioned in the 2020 case of Long.[64]

B. *Structural Racism at Each Stage of the Criminal Justice System*

Race-conscious exoneree advocates like The Innocence Project identify the effects of racism at various stages of the justice system's treatment of sex crimes, from eyewitnesses to judges.[65] Advocates and scholars argue for policy reforms, police reform, and stricter oversight in jury selection at each stage in efforts to combat the influence that racist myths have on key justice system actors.[66] While there are myriad ways in which sex crime cases may

60. *See id.*

61. *See* Gross et al., *supra* note 12, at 11 (including statistics on Hispanic, Native, Asian, and multiracial men).

62. *See* Duru, *supra* note 48, at 1316.

63. *See id.* at 1316, 1338 ("[T]he judge in one of the trials instructed the jury that when a black man is charged with raping a white woman, the law strongly presumes that the white woman would not possibly consent leading to the conclusion that a white woman would not stoop to intimacy with the inferior black and that sex between a black man and a white woman can consequently only be rape.").

64. *See supra* note 1, at 49–62.

65. *See Explore the Numbers: Innocence Project's Impact*, The Innocence Project, https://innocenceproject.org/exonerations-data [https://perma.cc/9H7U-D5Q2] (last visited June 17, 2024).

66. *See* Leona D. Jochnowitz & Tonya Kendall, *Analyzing Wrongful Convictions Beyond the Traditional Canonical List of Errors, for Enduring Structural and Sociological Attributes, (Juveniles, Racism, Adversary System, Policing Policies)*, 37 Touro L. Rev. 579, 584, 599 (2021) (identifying key actors as eyewitnesses, police, forensic laboratories, prosecutors, juries, and judges).

be mismanaged, the most common and influential injustices occur in witness identification and through police misconduct.[67]

1. Eyewitnesses

According to the National Registry of Exonerations, 69 percent of sexual assault exonerations involved eyewitness misidentification of the accused.[68] Eyewitnesses are one of the leading causes of men of color being wrongfully convicted for sexual violence.[69] Despite the fact that less than 11 percent of sexual assaults involve Black male perpetrators and white female survivors, over half of the exonerees for white women survivor cases are Black men.[70] This discrepancy in the data occurs because white people are more likely to misrecognize or fail to distinguish amongst people of color, causing 79 percent of Black exonerees to be those whom white people misidentified as the perpetrators.[71]

2. Police Officer Conduct

The National Registry of Exonerations separates official misconduct into five categories: witness tampering, misconduct in interrogations, fabricating evidence, concealing exculpatory evidence, and misconduct at trial.[72] Officer misconduct is widespread.[73] At least two-thirds of the 36,000 defendants in the National Registry of Group Exonerations list involved police misconduct.[74] For individual exonerations, 1,522 of the 3,500 known and documented cases in the National Registry involve officer misconduct.[75] The rate of police officer misconduct increases significantly when defendants

67. *See* Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, U. Mich. Pub. L. Research Paper No. 21–003, 1, 145–63 (2020).

68. *See* Gross et al., *supra* note 12, at 11.

69. *See id.* at 11–12.

70. *See id.* at 12 ("57% of white-victim sexual assault exonerees are black (101/177), and 37% are white—which suggests that black defendants convicted of raping white women are about eight times more likely to be innocent than white men convicted of raping women of their own race.").

71. *See id*. at 11–12 (noting that "[t]he rate of eyewitness errors is much higher for innocent black defendants" than for innocent white defendants).

72. *See* Gross et al., *supra* note 67, at 29.

73. *See Group Exonerations Registry*, The Nat'l Registry of Exonerations, https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations [https://perma.cc/FT38-UM2W] (last visited June 17, 2024) (recording that over 23,000 defendants in the Group Exonerations Registry experienced police officer misconduct).

74. *See id.*

75. *See id.* (noting that 43 percent of exonerations involve officer misconduct).

are Black.[76] While some officers commit blatant acts of misconduct that garner national attention like torture or threats of violence, the more subtle forms of coercion that occur during interrogations are often laced with racism and harder to detect as causes of wrongful convictions.[77] While statutes and courts decry this misconduct, especially that which amounts to coercion, the safeguards meant to protect against these are far from ironclad.[78]

For example, the 1966 landmark case *Miranda v. Arizona* resulted in a decision that protects defendants against police officers' attempts to coerce them into incriminating themselves.[79] The Supreme Court held that officers are obligated to inform suspects of their Fifth Amendment right against self-incrimination.[80] The Court's decision to establish these mandatory *Miranda* warnings has provided a safeguard for those in police custody being interrogated about alleged criminal activity, also known as custodial interrogation. Custodial interrogation is an inherently coercive setting wherein officers need to convince those who are criminals to confess; therefore, officers may elicit false confessions simply by compelling suspects to talk when they would prefer not to speak.[81]

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76. *See* Gross et al., *supra* note 12, at 6 ("The rate of official misconduct is considerably higher among murder exonerations with black defendants than those with white defendants . . . For the most part, these differences by race are due to misconduct by police officers."); *see also* Gross et al., *supra* note 67, at i, x *(*charting in Table 6 that Black and Hispanic exonerees had official misconduct in 56 percent of their cases, compared to 52 percent of white exonerees' cases).

77. *See*, *e.g.*, Gross et al., *supra* note 67, at 136–40. (recounting how former Chicago Police Commander Jon Burge tortured suspects, the majority of whom were Black men, into giving false confessions by suffocating them, electrocuting them, using the N-word, shoving and clicking loaded shotguns in their mouths in Russian roulette fashion, and using an electric cattle prod on suspects' genitals: "Why did Daley and Burge's superiors in the police department tolerate if not encourage this reign of terror? The simplest answer is probably the best: they thought the defendants were guilty, they wanted murder convictions, and they didn't worry about the means. Plus they probably didn't mind the infliction of torture on men they believed were murderers—at least not when those men were Black. So torture became routine."). More subtle forms of coercion include lying, offering false promises, or feeding details. *See Stephens*, *infra* note 86.

78. *See*, *e.g.*, Marty Skrapka, *Silence Should be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*, 59 Okla. L. Rev. 357, 371–72 (2006); *see also* Deprivation of Rights Statute, 18 U.S.C.A. § 242 (West); Police Misconduct Provision, 34 U.S.C.A. § 12601 (West); Civil Rights Act of 1964, Title VI, 42 U.S.C.A. § 2000d (West).

79. *See* 384 U.S. 436(1966).

80. *See id.* at 444 (defining the Fifth Amendment right against self-incrimination as the right to remain silent in the face of custodial interrogation).

81. *See id.* at 477–78.

While straightforward on the surface, *Miranda* protections do not automatically apply to all instances of suspect behavior while in custody. For example, if a suspect is silent in custody before officers *Mirandize* the suspects, some circuit courts allow post-arrest, pre-*Miranda* warning silence to be used as substantive evidence of guilt.[82] Other courts find this unconstitutional because to hold otherwise incentivizes officers to delay *Mirandizing* in hopes of manufacturing "incriminating" suspect silence to raise at trial.[83] Proving that an officer deliberately delayed *Mirandizing* to manufacture evidence of guilt is difficult, thereby leaving open a dangerous opportunity for officers to mount evidence against innocent suspects.[84] *Miranda v. Arizona* solved some of the problems associated with officer misconduct that can lead to wrongful convictions, but this solution has some major limitations.[85]

While *Miranda* protects against coercion, false confessions may still occur under other constitutional interrogation tactics.[86] At least 12 percent of exonerations involved false confessions, but the means by which officers extract false confessions are not always considered misconduct.[87] Officers can lie about evidence, offer vague promises, and otherwise trick suspects into confessing without the officer's actions being labeled as misconduct.[88]

Legal scholar Klara Stephens identifies several "bad practices" that lead to false confessions but are not considered official misconduct.[89] She identifies these tactics as lying about the case, offering

82. *See* Skranka, *supra* note 78 (identifying a lack of a Supreme Court decision to address the circuit split over whether post-arrest, pre-*Miranda* silence is protected under the Fifth Amendment).

83. *See* United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2d Cir. 1980) ("In the absence of such a prophylactic rule [that prompts police to *Mirandize* swiftly], police might have an incentive to delay *Miranda* warnings in order to observe the defendant's conduct.").

84. *See id.* at 1100 (noting that "post-arrest silence is highly ambiguous and therefore lacks significant probative value" but instead is prejudicial).

85. *See* Skranka, *supra* note 78, at 388–89.

86. *See* Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 Neb. U. L. Rev. 593, 598, 619 (2019) (explaining that offering false promises to suspects that they can go home if they confess can compel innocent suspects who have been held for many hours to say what the officer wants to hear to be able to leave).

87. *See id.* at 598 (showing that false confessions occurred in at least 292 out of the 2400 cases analyzed in the study).

88. *See id.* at 617 ("We identified at least four broad categories of bad practices that do not arise to the level of 'coercion:' lying about the facts of the case, making false promises that do not amount to plea bargaining, feeding the suspect details of the crime, and interrogating a minor without a parent present.").

89. *See id.* ("While these bad practices are often present in interrogations

false promises, feeding the interrogee details about the case, and, for minors, interrogating without a parent present.[90] For example, sixteen-year-old rape survivor Fancy Figueroa was convicted of filing a false police report when officers made promises that they would help her find the stranger she accused if she wrote on a piece of paper that she was lying about the rape to cover up her pregnancy.[91] For the 291 exonerations in her study that involved false confessions, one or more of these bad practices occurred in 63 percent of the exonerees' interrogations.[92] With no laws barring these bad practices, the path to possible false confessions remains open.[93]

3. Other Actors: Juries, Judges, and Lab Analysts

Racist myths and stereotypes may also influence judges and juries.[94] For example, Black exoneree Michael Phillips was advised by his attorney to plead guilty to the rape of a sixteen-year-old white girl who misidentified him as the perpetrator because, according to his attorney, no jury would believe his testimony over that of a white girl.[95] Cases like these invite jury prejudice, especially when the only issue at trial is the suspect's identity. These cases

that include misconduct, it is useful to look at interrogations that were not "coercive" but where law enforcement used dangerous techniques to put pressure on the defendant all the same.").

90. *See id.* at 623–24 ("Most often the bad practice was feeding details of the crime to the suspect. Other frequently used bad practices are lying to the suspect, making false promises, and interrogating children without their parent being present.").

91. *See id.* at 619.

92. *See id.* at 617 (showing a table containing the statistic that 63 percent of exonerations included at least one bad practice).

93. *See id.* at 624 ("Only 2% of these false confessions were suppressed at trial, in whole or in part, even though 93% of the interrogations that produced them included misconduct, or bad practices that often lead to false confessions, or both.").

94. *See* Thorne Clark, *Protection from Protection: Section 1983 and the ADA's Implications for Devising a Race-Conscious Police Misconduct Statute*, 150 U. Pa. L. Rev. 1585, 1643 (2002) (noting that existing civil rights laws have not done enough to address the hidden legacies of racism that influence officer conduct, so "serious commitment[s] to ensuring that the constitutional rights of plaintiffs of color are honored in fact (not just in theory) requires a statute mandating that judges contextualize plaintiffs' claims by looking explicitly at the effects that the plaintiffs' race may have on interactions with, and treatment by, the police.").

95. *See* Gross et al., *supra* note 12, at 13 ("In 1990, Michael Phillips, an African American man, pled guilty in Dallas to the rape of a 16-year-old white girl who misidentified him. Phillips later said he entered the plea because his lawyer (who never investigated his claim of innocence) told him he would get life in prison if he went to trial and that no jury would believe a black man over a white girl.").

become battles of testimony between the suspect and a victim who is prone to misidentifying men of color as perpetrators.[96] According to the National Registry's study of cases involving sexual assault exonerees, in 79 percent of those cases, the only issue at trial was the identity of the rapist, and 88 percent of those cases involved eyewitness misidentification.[97]

Judges also tend to assign longer sentences to men of color than to white men.[98] Phillips, for example, spent twelve years incarcerated despite having no prior record for sexual or other violence.[99] Scholars can determine no other explanation for the disparity in sentencing length in these cases other than racism.[100] Procedural safeguards to prevent these racial disparities like jury selection regulation and sentencing guidelines remain ineffective because the legacies of racism are so entrenched in the legal system that the mechanisms that preserve racism are effectively undetectable.[101]

Lastly, lab analysts have significant influence over the conviction process and have notoriously contributed to wrongfully convicting men of color for sexual violence.[102] For example, lab analyst Joyce Gilchrist spent decades committing forensic fraud to help officers convict their chosen suspects.[103] Additionally, most rape kits do not get tested for reasons explained in Part IV.B, despite the fact that the majority of sexual violence exonerations occur through DNA evidence.[104]

III. Intersectionality and Structural Justice: An Overview

The aforementioned problems contributing to wrongful convictions of sexual violence are concerning, but when observed

96. *See id.* at 11.

97. *See id.*

98. *See id.* at iii. ("African-American sexual assault exonerees received much longer prison sentences than white sexual assault exonerees, and they spent on average almost four-and-a-half years longer in prison before exoneration. It appears that innocent black sexual assault defendants receive harsher sentences than whites if they are convicted, and then face greater resistance to exoneration even in cases in which they are ultimately released.").

99. *See id.* at 13 ("He spent 12 years in prison, an unusually long term for a rape by a defendant with no prior record for violence or sexual misconduct.").

100. *See id.*

101. *See* Clark, *supra* note 94, at 1637; *see also* Ruíz y Flores, *supra* note 16, at 171; Alexander, *supra* note 8, at 21.

102. *See, e.g.*, Gross et al., *supra* note 67, at 140–41 (recounting lab analyst Joyce Gilchrist's long history of falsifying DNA evidence results).

103. *See id.* at 141.

104. *See id.*; *see also The National Registry of Exonerations*, *supra* note 3.

through the singular lens of race, scholars fail to see how these problems are symptoms of a larger gender-based discriminatory system.[105] Racism and other forms of discrimination like sex discrimination occur long before a suspect is identified because all convictions start with treating survivors in particular ways.[106] A women of color structural feminisms approach utilizes intersectionality to reveal how prejudices against survivors of sexual violence decrease convictions for the actual perpetrators.[107]

A. *Intersectionality's Origins*

In 1991, Black female attorney and civil rights activist Kimberlé Crenshaw published the groundbreaking article, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color.* In doing so, Crenshaw popularized the concept of intersectionality.[108] The aim of her article was to help Black women articulate in legal settings the unique discrimination they faced, while drawing attention to feminist and critical legal theories' failures to account for intersecting discrimination against Black women.[109]

Crenshaw's work emerged from the intersection of critical legal studies, critical race theory, and feminist jurisprudence.[110] During the 1970s, mostly white, neo-Marxist scholars and law students aimed to expose the paradoxical and politically-charged nature of American legal doctrine.[111] In particular, these scholars challenged the myths of neutrality and apoliticality which the legal system claimed to embody.[112] Their critical work on legalized power, hegemony, oppression, and discrimination became known as the

105. *See supra* Part II.B.

106. *See infra* Part IV–V.

107. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. Chi. Legal F. 139 (1989) (presenting the concept of intersectionality); *see also* Ruíz y Flores, *supra* note 16, at 171.

108. *See* Crenshaw, *supra* note 107, at 140.

109. *See id.*

110. *See* Allison Daniel Anders & James M. DeVita, *Intersectionality: A Legacy from Critical Legal Studies and Critical Race Theory*, *in* Intersectionality & Higher Education: Theory, Research, & Praxis 31–44 (Donald Mitchell, Jr. ed., 2014).

111. *See id.* at 33 (noting the paradox of a supposedly neutral legal system that was designed by racist slave owning men interested in a democracy that preserved their authority).

112. *See id.* ("[C]ritical legal studies scholars encouraged students and left-leaning faculty to produce scholarship that confronted the myths of apolitical legal doctrine and a neutral legal system. Such analyses provided opportunities for scholars to identify ways that the practice of law creates, legitimates, and reproduces 'an unjust social order.'").

subfield of critical legal studies.[113] Crenshaw utilizes this field to critique the arguments that claim all citizens are protected under equal legal processes. She identifies how these arguments espoused colorblindness, a harmful means of ignoring how race continues to be a force of discrimination that renders "equal processes" unequal.[114]

Crenshaw also uses critical race theory to bring attention to the often-unexamined means by which the legal system institutionalizes racism.[115] As critical legal studies emerged, critical race scholars began integrating race analyses that unpacked and aimed to change the harmful nexus of race, law, and traditional approaches to theory.[116] Critical race theory went beyond civil rights scholarship, "many of which embraced incrementalism," to challenge the legal foundations that created civil rights issues in the first place.[117] Similarly, Crenshaw problematized the legal foundations that siloed discrimination claims into either sex or race.[118]

Finally, Crenshaw's work relies on feminist jurisprudence, particularly from a Black feminist standpoint.[119] Feminist legal theory officially began as a gender-based critique of critical legal studies.[120] Like critical legal studies, feminist jurisprudence focuses on power, alleged neutrality, and domination.[121] However, feminist critiques

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113. *See id.*

114. *See id.* at 34. In discussing Crenshaw's work, Anders and DeVita note that "[i]n a society where groups of people have been treated differently, as in the case of the United States, advocates for the idea of color blindness deny the histories of exploitation, oppression, and disenfranchisement and their effects." *Id.* Thus, a "neutral" equal process atop longstanding injustices will not produce an equal result. *See id.* In other words, a neutral procedure with non-neutral "data" replicates the non-neutral, i.e., biased realities that persist. *See id.*

115. *See id.* at 35.

116. *See id.* ("CRT [Critical race theory] was named such in order to specifically locate it at the intersection of critical theory, race, racism, and the law. Activists and scholars in the CRT movement sought 'to understand how a regime of white supremacy and its subordination of people of color have been created and maintained . . . .'").

117. *Id.* at 36. These legal foundations include constitutional neutrality principles, legal reasoning, equality theory, and Enlightenment rationalism. *See id.*

118. *See* Crenshaw, *supra* note 107.

119. *See id.* at 139 n. 2.

120. *See* Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. Legal Educ. 61, 63 (1988) ("As a self-conscious effort to pull feminism out of its marginal position, the organizers of the 1983 conference on critical legal studies . . . arranged for a segment of the conference that would focus solely on feminism . . . [these "fem'crits" began developing] theories about law and subordination and the role of law in eliminating or aggravating inequalities.").

121. *See id.*

start from lived experiences rather than from abstract, theoretical concepts.[122] Personal narrative is, therefore, a primary analytic method.[123] By centering Black women's experiences, Crenshaw used a feminist strategy to critique white feminism's singular focus on sex discrimination.[124] By centering Black women in her analysis, she was able to show how theories that focus on just one form of discrimination are limited and theoretically erase Black women's extra discriminatory experiences.[125] In essence, Crenshaw's critique both identifies the limitations of feminist legal theory and extends feminist methods to incorporate antiracism.[126]

B. *Crenshaw's Intersectionality Framework*

From these three critical theories, Crenshaw crafted a framework for explaining the failures of the legal system's antidiscrimination laws to protect individuals who face multiple forms of discrimination simultaneously.[127] She called this framework "intersectionality," which describes the ways in which people experiencing multiple forms of discrimination are left unattended at the intersections of the pathways that address single forms of discrimination.[128]

122. *See id.* at 61 ("[T]he feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique beings—and, some would argue, remains—in a mal-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced.").

123. *See id.* at 61–62 (describing personal narrative as offering theory and analysis from one's personal account and experiences, i.e., "not only in conceptual constructs but in experience.").

124. *See* Crenshaw, *supra* note 107, at 139–40 ("With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination along a single categorical axis . . . I want to examine how this tendency . . . is dominant in antidiscrimination law and . . . is also reflected in feminist theory . . . .").

125. *See id.* ("I will center Black women in this analysis in order to contrast the multidimensionality of Black women's experience with the single-axis analysis [like feminist legal theory] that distorts these experiences. Not only will this juxtaposition reveal how Black women are theoretically erased, it will also illustrate how this framework imports its own theoretical limitations that undermine efforts to broaden feminist and antiracist analyses.").

126. *See id.* at 154 ("The value of feminist theory to Black women is diminished because it evolves from a white racial context that is seldom acknowledged.").

127. *See id.* at 140 ("[D]ominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis . . . [T]his single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group.").

128. *See* Crenshaw, *supra* note 16, at 1244 (reasserting "that many of

Specifically, the legal system is designed to support individuals who experience discrimination along one path or protected identity trait, but fails to account for the unique location of oppression at the intersection of multiple paths of discrimination, such as those who are both queer and people of color, for example.[129]

This phenomenon is particularly apparent when racial discrimination cases implicitly focus on men of color and sex discrimination cases implicitly focus on white women.[130] When faced with a mixed race and sex discrimination claim, courts routinely separate the two rather than analyzing them together.[131] For example, in *Moore v. Hughes Helicopter, Inc.*, a Black female employee attempted to show intersectional workplace discrimination in promotion practices when she argued that she was denied a rightful promotion on account of her combined gender and race.[132] However, the court refused to consider the available sex and race statistics to support Black women as an individual class that experiences discrimination.[133] The court separated Moore's claim into sex-based discrimination and race-based discrimination, which did not provide a clear account of her differential treatment as a Black woman since the company promoted Black men and white women, but not Black women.[134] Intersectionality explains this legal failure to account for the compounding discrimination that Black women face.[135]

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the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood," particularly in the legal system, "and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.").

129. *See id.*

130. *See* Crenshaw, *supra* note 107, at 140 ("[I]n race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged [People of Color]; in sex discrimination cases, the focus is on race- and class-privileged women.").

131. *See id.* at 141–50.

132. *See* 708 F.2d 475 (9th Cir. 1983).

133. *See id.* at 481.

134. *See id.* at 480 ("The court would not allow Moore to represent white females because Moore had never claimed before the EEOC that she was discriminated against as a female, but only as a [B]lack female . . . Moore was not permitted to represent black male employees . . . [in part because she could not establish] a prima facie case of discrimination against [them].").

135. *See* Crenshaw, *supra* note 107, at 140 ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

C. *Intersectionality's Earlier Roots in Activism*

While Crenshaw is often considered the lead scholar on intersectionality, the general concept precedes her.[136] In 1851, Sojourner Truth, African American civil rights activist, declared the famous words "Ain't I a woman?" which called attention to the different treatment she received as an African American woman from both white women and African American men.[137] Born into slavery in 1797, Truth became a civil and women's rights activist, preacher, and abolitionist who challenged other renowned former slave activists such as Frederick Douglas, who argued that formerly enslaved men should have the right to vote before women.[138] Her work drew attention to the unique challenges that African American women faced on the basis of racism intersecting with sexism.[139]

Activists like Truth went on to inspire the 1960s Black feminist group, the Combahee River Collective, Black feminist scholar bell hooks, Black queer feminist poet and activist Audre Lorde, Black feminist playwright Ntozake Shange, Black reproductive justice trailblazer Loretta Ross, and contemporary Black legal activists like Angela Davis.[140] Intersectionality does not only have roots in

136. *See* Debra Michals, *Sojourner Truth*, Nat'l Women's Hist. Museum (2015), https://www.womenshistory.org/education-resources/biographies/sojourner-truth [perma.cc/FX97-DG7Y].

137. *See* Crenshaw, *supra* note 107, at 153 (describing how Truth noted that her Blackness precluded her from the feminine stereotypes of fragility that would have prevented her from being forced to labor in the fields but that her gender also exposed her to hyper sexualization); *see id.* at 154"[T]his 19th-century Black feminist challenged not only patriarchy, but she also challenged white feminists wishing to embrace Black women's history to relinquish their vestedness in whiteness.").

138. *See* Michals, *supra* note 136.

139. *See id.*

140. *See* The Combahee River Collective, How We Get Free 15 (1977) ("[W]e are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking."); *see also* bell hooks, Ain't I a Woman: Black Women and Feminism 15–196 (1999) ("In a retrospective examination of the black female slave experience, sexism looms as large as racism as an oppressive force in the lives of black women."); Audre Lorde, Sister Outsider: Essays and Speeches 45–52, 114–33 (1984) ("Certainly there are very real differences between us of race, age, and sex. But it is not those differences between us that are separating us. It is rather our refusal to recognize those differences, and to examine the distortions which result from our misnaming them and their effects . . . ."); Ntozake Shange, For Colored Girls Who Have Considered Suicide/When the Rainbow is Enuf 45 (1975) ("but bein alive & bein a woman & bein colored is a metaphysical dilemma" [sic]); *see Black Feminist Rants*, *supra* note 29 ; Angela Y. Davis, Women, Race, & Class 137–48 (1983)

Black feminism; there is a significant collective of contributions to intersectional theory from Indigenous women, Latina women, queer women, and many other marginalized women.[141]

These communities also form a recently articulated and developing body of work referred to as women of color structural feminisms:

("'Woman' was the test, but not every woman seemed to qualify. Black women, of course, were virtually invisible within the protracted campaign for woman suffrage.").

141. For example, Indigenous women like 1880s Sioux activist Zitkala-Sa and Piute activist Sarah Winnemucca, contemporary scholars like Anishinaabe writer Leanne Betasamosake Simpson, Stó:lō Nation/Salish poet Lee Maracle, queer Mohawk writer Beth Brant, and legal activists like Muscogee/Creek attorney Sarah Deer all identify the intersecting discrimination of racism, sexism, homophobia, and colonialism that Indigenous women face. *See* Zitkala-Sa, American Indian Stories, Legends, and Other Writings 5–264 (1901); Sarah Winnemucca Hopkins, Life Among the Piutes: Their Wrongs and Claims 5–248 (1883); Leanne Betasamosake Simpson, As We Have Always Done: Indigenous Freedom Through Radical Resistance 39–54 (2017) ("[S]exual and gender violence has to be theorized and analyzed as vital, not supplemental, to discussions of colonial dispossession. Indigenous bodies, particularly the bodies of 2SQ people [two-spirit and/or queer], children, and women, represented the lived alternative to heteronormative constructions of gender, political systems, and rules of descent."); Lee Maracle, I am Woman: A Native Perspective on Sociology and Feminism 1–146 (2d. ed., 1996); Beth Brant, Writing as Witness: Essay and Talk 5–16 (1984) ("The few women of color who have broken through this racist system are held up as *the* spokespeople for our races. It is implied that these women are the only ones *good* enough to 'make it' [get published]. These women are marketed as exotic oddities."); Deer, *supra* note 30, at 149–67 (2009) (discussing how intersecting racism, sexism, and colonialism have led to many Indigenous women experiencing sexual violence).

Likewise, Chicana political activist Martha P. Cotera, queer Chicana poet Gloria Anzaldúa, and Chicana scholar Aída Hurtado raise similar intersectional issues for Chicanx/Latinx women who face racism, sexism, homophobia, and xenophobia. *See* Martha P. Cotera, Chicana Feminist 1–68 (1977) (providing a Chicana analysis of intersectional oppression regarding race, class, gender, sexual orientation, and ethnicity); *see also* Gloria Anzaldúa, *Speaking in Tongues: A Letter to 3rd World Women Writers in* This Bridge Called my Back: Writings by Radical Women of Color 165–73 (Cherrie Moraga & Gloria Anzaldúa, eds., 1981) ("Unlikely to be friends of people in high literary places, the beginning woman of color is invisible both in the white male mainstream world and in the white women's feminist world, though in the latter this is gradually changing. The *lesbian* of color is not only invisible, she doesn't even exist."); Aída Hurtado, Intersectional Chicana Feminisms: Sitios y Lenguas 36–186 (2020) (expanding on Cotera's work that "lays out the experiential basis (or sitios) for developing new discourses (or lenguas) that encapsulate the feminisms developing on the ground as Chicanas articulate their oppression at the intersections of race, class, gender, sexuality, and ethnicity").

> [M]any of the basic principles of a structural account of women of color feminist theory can already be found in intersectional and proto-intersectional social thought, as well as in the rich anti-colonial traditions and oral herstories of Black, Latina, Asian, and Indigenous women's activism. They are also evident in discussions of structural oppression and epistemic violence) . . . .[142]

Philosopher Elena Ruíz emphasizes that women of color structural feminisms are not a singular theory, but rather a collection of antidiscrimination approaches with shared characteristics that include "an analysis of power as intersectional oppressions."[143] Thus, women of color collectively have developed the framework for intersectionality, while Crenshaw is considered the primary scholar for bringing intersectionality into the legal domain.[144] Hers is a vital method for identifying how multiple forms of discrimination work in concert to both harm and hide harm in the legal system's treatment of sexual violence. Failing to use intersectionality and develop a structural account would replicate the same kinds of erasures about which Crenshaw warned.[145]

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142. *See* Ruíz y Flores, *supra* note 16, at 175 (citing Patricia Hill Collins, Intersectionality (2017); Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, *in* Feminist Social Thought: A Reader 219–42 (Diana Tietjens Meyers, ed., 1997); Cherríe Moraga, *From a Long Line of Vendidas: Chicanas and Feminism*, *in* Making Face, Making Soul/Haciendo Caras: Creative and Critical Perspectives by Feminists of Color (Gloria Anzaldúa & Cherríe Moraga, eds., 1995); Kristie Dotson, *Making Sense: The Multistability of Oppression and the Importance of Intersectionality*, *in* Why Race and Gender Still Matter: An Intersectional Approach 43–58 (Namita Goswami, Maeve M. O'Donovan & Lisa Yount eds., 2014); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* Marxism and the Interpretation of Culture (Cary Nelson & Lawrence Grossberg, eds., 1988).

143. *See* Ruíz y Flores, *supra* note 16, at 177–80 (listing the shared characteristics as the following presumptions: (1) oppression is organized, (2) social and political systems are not value-free, systems function to perpetuate and preserve colonial violence, and (3) power must be analyzed as intersectional oppressions).

144. *See* Allison Daniel Anders & James M. DeVita, *supra* note 110, at 31; *see also* Crenshaw, *supra* note 107.

145. *See* Crenshaw, *supra* note 107, at 139–40 ("[A]ntidiscrimination doctrine [a single issue/non-intersectional approach] essentially erases Black women's distinct experiences, and, as a result, deems their discrimination complaints groundless.").

IV. Idealizing Victimhood: Gendered Discrimination Along the Crime Funnel

Scholars agree that the ease by which a survivor of sexual violence moves through the justice system is dictated in large part by the survivor's proximity to the ideal kind of victim that white patriarchal society deems most worthy of justice.[146] Idealizing victimhood is what scholars call the Ideal Victim Myth.[147] According to legal scholar and criminologist Nils Christie, the ideal rape victim is weak, blameless, engaged in a respectable activity at the time of the assault, and attacked by a threatening stranger.[148] As the following subparts demonstrate, this true victim is most likely to succeed in the court of law.[149] She is not only the legal system's ideal, but also the standard for who is rape-able in the first place.[150] In contrast, non-ideal victims' experiences are seldom considered rape due to discriminatory perceptions of them as hypersexual, "asking for it," not entitled to giving consent, and so on.[151]

As intersectional, women of color structural feminists have noted, Christie's analysis is missing several factors: the ideal victim is also a white, straight, cisgender, nonincarcerated, English-speaking American citizen.[152] Without these additional traits, scholars like Hannah Brenner find that a non-ideal survivor's experience is unlikely to be legally salient.[153] Furthermore, legal scholar Deborah Dinner concludes that the myth is rooted in common law's legacy of patriarchy and sexism and is still pervasive today, manifesting in each stage of the legal process.[154]

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146. *See* Nils Christie, *The Ideal Victim*, From Crime Pol'y To Victim Pol'y: Reorienting the Just. Sys. 17, 19 (Ezzat A. Fattah ed., 1986).

147. *See id.*; *see also* Hannah Brenner et al., *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 Geo. J. Gender & L., 521, 529–36 (2016).

148. *See* Brenner et al., *supra* note 147, at 533.

149. *See id.*

150. *See id.* at 534 ("It is not truly the case that a particular woman is incapable of being raped, rather even a forcible sexual act committed against her will is unlikely to be construed as such.").

151. *See infra*, Part V.

152. *See id.* at 535 (For example, "[r]ace plays an important role in the 'ideal victim' discourse . . . [such that Black and Indigenous] female inmate victims of sexual violence face especially stringent barriers in attaining 'ideal victimhood."). There are even more missing traits worth considering: able-bodied, neuro-typical, conforming to mainstream beauty standards, and so on.

153. *See id.* at 534–35 ("[T]hose who do not conform to a set of expected characteristics of what a victim of sexual violence should look like are never afforded victim status.").

154. *See* Deborah Dinner, *Seeking Liberty, Finding Patriarchy: The Common Law's Historical Legacy*, 61 B.C.L. Rev. E-Supplement I.-89 (2020).

From reporting to conviction, legal scholar Corey Rayburn Yung describes how each stage of the legal process involves gatekeepers that make access to justice more difficult for non-ideal victims.[155] Yung calls his structural account the "crime funnel model," wherein fewer and fewer sexual violence cases pass through subsequent hurdles or actors toward a conviction of the perpetrator.[156] Yung's key gatekeepers along the sex crime funnel model are police officers, prosecutors, juries, judges, and even legal standards.[157]

A. *Step 1: Reporting and Officer Bias*

According to the National Sexual Violence Resource Center, sexual assault is the most underreported type of crime.[158] There are myriad reasons for underreporting, but one of the most significant is mistrust in law enforcement.[159] In the past decade, approximately 15 percent of survivors did not report solely because they did not trust police to file a report.[160] Their mistrust is statistically supported; according to an international human rights study, police failed to investigate approximately one million rape complaints between 1995 and 2012.[161] Other survivors fear that the perpetrators will retaliate if they report.[162] Fear of retaliation further indicates that

155. *See* Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. Rev. 205, 209–10 (2017). Arguably, the ideal victim myth begins before reporting when perpetrators gaslight survivors or when survivors internalize the myth and blame themselves for the experience. In terms of the actors and elements of the legal system, though, the first step revolves around officers and reporting. *See id.*

156. *See id.* at 218.

157. *See id.* ("At each stage of a criminal case, there is the potential that an actor in the system will discard the case.").

158. *See* Jennifer Benner, *New Data - Sexual Assault Rates Doubled*, Nat'l Sexual Violence Res. Ctr. (Oct. 10, 2019), https://www.nsvrc.org/blogs/new-data-sexual-assault-rates-doubled/ [https://perma.cc/FD5L-GVVF] (last visited Oct. 31, 2021) ("[T]he 2018 NCVS data continues to show that rape and sexual assault remain the most underreported crimes.").

159. *See* Yung, *supra* note 155, at 209 (concluding that "police are the largest obstacle to the prosecution and conviction of rapists in the United States").

160. *See id.*

161. *See id.* at 210; *see also* Caelainn Barr, *Thousands of Rape Reports Inaccurately Recorded by Police*, The Guardian, (Sept. 19, 2019) https://www.theguardian.com/society/2019/sep/19/thousands-of-reports-inaccurately-recorded-by-police/ [https://perma.cc/N6Z9-S6CA] (revealing that of the "audits of thirty-four police forces published between August 2016 and July 2019 [o]nly three of them were found to have accurately recorded complaints of rape").

162. *See Scope of the Problem*, *supra* note 26.

officers are not creating an adequate sense of safety and protection for survivors from perpetrators.

Yung found that the majority of police officers believe in the ideal victim myth, and their belief in the myth instills a culture of disbelief for survivors who do not embody the myth.[163] When officers determine that a rape complaint is false or not worth investigating, Yung calls this phenomenon "rape law gatekeeping."[164] In fact, Yung shows that many officers relabel rape as consensual sex, meaning thousands of complaints are never even investigated.[165] For the few complaints from non-ideal victims that are investigated, Yung's research reveals that officers are hostile towards survivors and even prosecute survivors for allegedly filing false complaints.[166]

B. *Step 2: DNA Testing and Officer Bias*

If a survivor's complaint is investigated, officers have the opportunity to rely on DNA evidence from rape kits; however, officers do not choose to test all kits.[167] Despite underreporting, there are still thousands of rape kits collected annually.[168] Testing one costs between $500 and $1,200, so many precincts cite financial constraints as the reason for the backlog.[169] Because of this, officer prioritize testing kits based on the likelihood of a conviction.[170] They consider the degree of injury, the crime's seriousness,

163. *See* Yung, *supra* note 155, at 209–10 ("Research shows police believe 'rape myths' at a much higher rate leading to widespread distrust of rape victims.").

164. *See id.* at 210.

165. *See id.* Officers' conversion of rape into consensual sex is a clear example of gatekeeping the label of rapeable itself, just as Brenner and colleagues described in the ideal victim myth. *See* Brenner et al., *supra* note 147; *see also* Yung, *supra* note 155.

166. *See* Yung, *supra* note 155, at 219.

167. *See* Stephanie Fulton, *The Rape Kit Backlog: The Continuous Hampering of Society's Protection and Liberty Interests*, 40 Women's Rts. L. Rep. 43, 46–47 (2018).

168. *See* USA Facts Team, *How Many Rape Kits Are Awaiting Testing in the US? See The Data by State*, US Facts (July 3, 2023) https://usafacts.org/articles/how-many-rape-kits-are-awaiting-testing-in-the-us-see-the-data-by-state/ [https://perma.cc/7X35-THE7] (charting an average of 780 kits received in 2022 by listed states and noting that at least 25,000 kits remained untested from 2022 alone).

169. *See* National Center for Victims of Crime, *FAQ: How Much Does DNA Testing Cost?*, Nat'l Ctr. for Victims of Crime https://victimsofcrime.org/frequently-asked-questions/#:~:text=A%20sexual%20assault%20evidence%20kit,analyze%20the%20offender's%20DNA%20profile/ [https://perma.cc/727R-KCLV] (last visited Mar. 26, 2024) ("A sexual assault evidence kit can cost between $500 and $1,200 to analyze.").

170. *See* Fulton, *supra* note 167, at 46.

the dangerousness or blameworthiness of the perpetrator, resource availability for testing, corroborating evidence, and the credibility and cooperation of the victim.[171] This final factor, victim credibility and cooperation, invites the ideal victim myth to influence officer perception of the victims and, according to a ten-year research study on sexual assault, directly leads to the significant under-testing of survivors' kits who do not embody the ideal victim.[172]

Some courts like the First Circuit permit officers to dispose of old untested kits.[173] Only five states mandate testing of all rape kits.[174] For kits that are tested, many fall into a growing backlog that leave some survivors waiting over twenty-five years for labs to process their kits.[175] Scholars like Yung and Fulton have clarified, though, that the term "backlog" implies no fault or responsibility on the overwhelmed labs, when, in actuality, the lack of concern for survivors unnecessarily slows the testing process.[176]

C. *Step 3: Prosecutor Bias*

The intimate relationship officers have with prosecutors reinforces the ideal victim myth at further stages in the criminal justice system.[177] Prosecutors want to maintain high conviction rates; therefore, they frequently pressure police to dismiss non-ideal victim cases.[178] Doing so creates a self-reinforcing cycle where prosecutors

171. *See id.*

172. *Id.* at 47–48 ("[W]hen victims lack or do not express stereotypical behaviors anticipated by police, such as demonstrating fear or anger, crying intensely, or reporting the crime without hesitation, the police were more inclined to believe the victim was lying . . . [consequently,] these attitudes often shape the decision of whether to [test rape kits].").

173. *See id.* at 49 (citing Dennis v. Wiley, 22 So.3d 189 (La. Ct. App. 1st Cir. 2009), holding that "law enforcement owes no duty to victims to preserve evidence obtained").

174. *See* Nicholas Kristof, *Despite DNA, the Rapist Got Away*, N.Y. Times (May 9, 2015) https://www.nytimes.com/2015/05/10/opinion/sunday/nicholas-kristof-despite-dna-the-rapist-got-away.html/ [https://perma.cc/3AZQ-RWGU] (listing the five states as Colorado, Illinois, Michigan, Ohio and Texas); *see also* Yung, *supra* note 155, at 207 (adding that as of 2014, the United States had four-hundred thousand untested kits).

175. *See* Fulton, *supra* note 167, at 52–53 (noting that this severe backlog also creates implications with the statute of limitations).

176. *See id.*; *see also* Yung, *supra* note 155 at 207 n.8.

177. *See* Yung, *supra* note 155, at 219 ("Police often fail to investigate rape cases because of instructions from local prosecutors . . . The best evidence indicates less than one percent of rapes actually result in a prosecution.").

178. *Id.* (finding that prosecutors pressure officers to not investigate crimes because prosecutors "do not want to pursue anything short of 'slam dunk' prosecutions to maintain high conviction rates").

make decisions based on how police present the case, a presentation often tainted by racial and gendered biases.[179]

Even if police bring a case to a prosecutor, prosecutors can choose not to take the survivor's case if the survivor's chances of successfully presenting her case appear too low.[180] At this case screening stage, prosecutors use a "convictability standard," a standardization of ideal victim factors.[181] The winning formula is often a white woman victimized by a male stranger of color.[182] To determine whether a survivor's experience would win, prosecutors glean factors and evidence from interviews with the survivors.[183] In this context, prosecutors hold immense power to translate the survivor's experiences into a convictable or non-convictable crime.[184] How a prosecutor frames the incident has significant bearing on how a judge and jury may perceive the survivor, and this framing is often influenced by the ideal victim myth.[185] If a prosecutor determines that the survivor's experience translates into a winning case, the survivor gets one step further in the criminal justice system, but becomes bound by the prosecutor's interpretation.[186]

D. *Step 4: Juries, Judges, and Legal Standards*

When determining whether to move forward with a case, prosecutors consider whether a jury would or would not convict the

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179. *See id.*

180. *See* Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*¸ 45 Oxford U.P. 393 (1998).

181. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking* Law & Soc'y Rev. 531, 535 (1997) ("Concern with convictability creates a 'downstream orientation' in prosecutorial decision making—that is, an anticipation and consideration of how others (i.e., jury and defense) will interpret and respond to a case.").

182. *See id.*; *see also* Frohmann, *supra* note 180, at 395; UK Ctr. for Rsch. on Violence Against Women, *Top 10: What Percentage of Rape Cases Get Prosecuted? What Are the Rates of Conviction?* https://opsvaw.as.uky.edu/sites/default/files/07_Rape_ Prosecution.pdf (last visited Sept. 24, 2021).

183. *See* Frohmann, *supra* note 180, at 400.

184. *Id.* ("During the interview process, prosecutors translate the victims' personal rape experience into the legal paradigm. They decide whether a 'crime' has been committed, and if so, what it is. They determine the 'facts' of the incident and assess the 'evidence' for potential prosecution.").

185. *Id.* at 401 ("The conversational structure of this exchange demonstrates the power of the prosecutor and the DDA's office to frame an incident.").

186. *Id.* ("In return for the victim's acquiescence to a legal interpretation of her experience, she gets access to the criminal justice system and its sanctions.").

suspect.[187] A prosecutor's rejection of a case due to their anticipation that a jury would not reach a guilty verdict is not only common, but considered a legitimate justification.[188] The pervasiveness of the ideal victim myth means that even prosecutors who are aware of the myth may still decide to uphold it because juries are more likely to find guilty verdicts for ideal victims.[189]

Jurors are affected by many of the ideal victim myth's factors through implicit and explicit bias, including the victim's prior sexual history, prior criminal records, blameworthiness for consuming alcohol or drugs, inviting the perpetrator inside, knowing the perpetrator, wearing provocative clothing, waiting to report, not emoting or appearing visibly injured, and having certain kinds of privilege like whiteness, economic stability, and education level.[190] For example, the compiled results of a 2020 research study on juror belief alignment with the ideal victim myth found that "there is overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases."[191] The more the victim appears different from the prejudicial attitudes jurors have about what constitutes a blameless, believable victim—white, modestly dressed, educated and so on—the more likely jurors find she is partially to blame or she is lying.[192] Similarly, judges can be influenced by many of these same ideal victim myth factors.[193] For example,

187. Frohmann, *supra* note 181, at 535–36 ("Concern with convictability creates a 'downstream orientation' in prosecutorial decisionmaking—that is, an anticipation and consideration of how others (i.e., jury and defense) will interpret and respond to a case . . . [and so] prosecutors orient particularly toward 'the jury.'").

188. *See id.* at 536.

189. *See id.* at 543–45; *see also* Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 Tex. Tech. L. Rev. 219, 231–35 ("The power of rape myths is not mere conjecture; studies have shown that they impact mock jurors and prosecutors.").

190. *See* Lave, *supra* note 189, at 231–35 (Scholar Lave defines a good victim according to an experienced sex crimes prosecutor's description: "Good victims have jobs (like stockbroker or accountant) or impeccable status (like a policeman's wife); are well-educated and articulate, and are, above all, presentable to a jury: attractive—but not too attractive, demure—but not pushovers. They should be upset—but in good taste—not so upset that they become hysterical.").

191. *See* Fiona Leverick, *What Do We Know About Rape Myths and Juror Decision Making?*, 24 Int'l J. Evidence & Proof 255, 273 (2020).

192. *See id.* at 255–74.

193. *See* Lave, *supra* note 189, at 231–35. Judges are not influenced by emotional testimony in the ways that juries are, but they are otherwise influenced by the same myth factors. *See id.* at 233. For example, a Texas

some trial judges dismiss cases because they suspect a jury, persuaded by ideal victim factors, would never convict the defendant.[194]

Although judges are perhaps more influenced by legal standards than a survivor's appearance and courtroom behaviors, sexual assault standards also reflect ideal victim myths.[195] In fact, the history of criminalizing sexual assault is rooted in the treatment of women's virginities and bodies as her male father or husbands' property that, when assaulted, were damaged.[196] Lawmakers continue to limit the scope of definitions for legally significant terms like force, penetration, consensual, and resistance, which inevitably protects most perpetrators and blames non-ideal survivors.[197] Even as statutory language has expanded to recognize more kinds of sexual violence, including nonforcible assault, the standards that survivors must meet continue to be quite high and mythologically infused.[198]

In tort law, for example, the old-fashioned, settler, cishetero patriarchal perception that sexual assault is an exceptional aberration has contributed to the current and seldom-met scope-of-employment and foreseeability standards applicable in current employer vicarious liability law.[199] For example, if an employee is sexually assaulted by a coworker, the survivor has two paths to recover from their employer under a vicarious liability theory: (1) the survivor must show that the assault occurred within the perpetrator's scope of employment, or (2) that the assault itself was reasonably foreseeable to the employer.[200]

Courts rarely find that an assault occurred within the scope of employment because sexual misconduct is inherently considered

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appellate court reversed the trial court's guilty verdict because evidence of the survivor's "promiscuous reputation" was excluded. *See id.* at 231 (citing Graham v. State, 67 S.W.2d 296 (Tex. Crim. App. 1933)). While later 1970's rape shield laws now prevent sexual history evidence from being introduced in most circumstances, there still are situations in which the survivor's history is admissible. *See id.* at 231–32.

194. *See* Yung, *supra* note 155, at 219.

195. *See*, *e.g.*, Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013).

196. *See* Cheryl A. Whitney, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts are Criminally Punished*, 27 RUTGERS L.J. 417, 420 (1996).

197. *See id.* at 424–29.

198. *See* Chamallas, *supra* note 195, at 137.

199. *Id.* ("Many courts continue to treat sexual abuse cases as exceptional, echoing the sentiments of old-fashioned (pre-1970s) criminal laws that once approached rape and sexual assault as qualitatively different from other forms of violence and erected special legal barriers to prosecution.").

200. *See id.* at 146.

exceptional and unusual.[201] For example, in *Alma W. Whitson v. Oakland Unified School District*, a janitor raped a minor student in the janitor's office, but the school was not held vicariously liable because the rape did not occur within the scope of his janitorial duties.[202] Instead, the court found that the janitor's actions were personally motivated.[203]

Seeing as the scope-of-employment option has been narrowly defined by courts, most survivors bear the burden of showing that their assaults were reasonably foreseeable.[204] Most courts require evidence of foreseeability in the form of the perpetrator's prior criminal history, high crime rates in the area, or a history of complaints from others against the employee.[205] Absent this robust evidence, the presumption of exceptionalism for sexual violence works in concert with ideal victim myths to bar relief for survivors.[206]

Outside the context of employment claims, courtrooms are often reduced to a battle of testimony in which the survivor's testimony is considered more credible if she meets the myth's criteria.[207] Because rape kits are not always tested or conclusive, advocates attempt to utilize other forms of probative evidence to bolster their clients' testimony that they were raped by the alleged perpetrators.[208] One such form of evidence is demeanor evidence, and the

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201. *See* Rochelle Rubin Weber, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513, 1521–23 (1992) ("Many jurisdictions focus on the personal nature of sexual assaults, or the unexpected and extraordinary nature of such results, to determine that employers cannot be held liable.").

202. *See* Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 290 (Cal. App. 1 Dist. 1981) (finding that "[s]exual molestation is in no way related to mopping floors, cleaning rooms, or any of the other tasks that are required of a school custodian").

203. *See id.* (finding that the perpetrator was "prompted by wholly personal motivations [that were] clearly not required or incidental to his duties as a school custodian").

204. *See* Chamallas, *supra* note 195, at 144–49.

205. *See* Lacy v. District of Columbia, 424 A.2d 317 (D.C. 1980); *see also* District of Columbia v. Doe, 524 A.2d 30 (D.C. 1987) (finding that the high prevalence of crime in the area surrounding the school put the school on notice for potential harm like the assault in question).

206. *See* Chamallas, *supra* note 195, at 136. These high legal standards for vicarious liability tend to preclude survivors from obtaining any form of monetary recovery since compensation from perpetrators is "a notoriously unreliable source of funds." *Id.*

207. *See* Lave, *supra* note 189, at 230 ("[A] conviction is unlikely, not because of evidentiary problems, but because prospective jurors are simply *unlikely to believe* the victim due to bias because she is [B]lack or poor.") (emphasis added).

208. *See* Tara Kalar et al., *A Crisis of Complacency: Minnesota's Untested*

ideal victimhood myth invites this kind of commentary on survivors' demeanors and behaviors at the time of filing.[209]

For example, the fresh complaint doctrine essentially enshrines the ideal victimhood myth in law.[210] This doctrine states that a truthful, believable survivor would immediately and hysterically file a complaint.[211] Though courts have begun to modify this rule in the last two decades, many jurisdictions still admit evidence about the survivor's demeanor at the time of filing, and the more emotional and upset her demeanor, the more compelling this evidence is for a guilty conviction.[212]

Each step of the criminal justice system is structured to prevent survivors from having their perpetrators convicted.[213] Because of the ideal victim myth, law enforcement, prosecutors, juries, judges, and the legislators who craft legal standards for sex crimes all tend to not believe nor support non-ideal victims.[214] As a result, very few perpetrators get convicted, and those who do are often those involved in cases with ideal victims.[215]

Rape Kit Backlog, 74 Bench & Bar Minn. 22 (2017).

209. *See* Commonwealth v. King, 445 Mass. 217, 218 (2005) (considering demeanor evidence, i.e., the behaviors, mannerisms, and nonverbal communications of a survivor).

210. *See id.* ("Under the fresh complaint doctrine in effect at the time of trial, the Commonwealth was permitted to introduce out-of-court statements seasonably made by the victim after the alleged sexual assault for the purpose of corroborating her own testimony concerning the alleged assault (so-called 'fresh complaint' testimony).").

211. *See id.* at 229 ("American courts, in turn, endorsed the belief that the failure of a rape victim to make a prompt complaint of sexual assault was akin to an inconsistent statement at odds with the complainant's court room testimony about rape.").

212. *See id.* at 237–42 (deciding to modify the fresh complaint doctrine into the first complaint rule, which removes the promptness factor but maintains opportunities to comment on survivors' behaviors and comments when they first file a complaint).

213. *See* Christie, *supra* note 146, at 19; *see also* Ruíz y Flores, *supra* note 16, at 174 ("Traditionally, structural violence is understood as a relational theory of top-down harm between social institutions . . . and individuals, where the relation is facilitated by social practices like sexism, racism, classism, and ableism that disadvantage individuals . . . . it [structural violence] has always been distinguished from behavioral violence by having no identifiable culprit or aggressor.").

214. *See* Yung, *supra* note 155, at 218.

215. *See id.*; *see also* Christie, *supra* note 146, at 19.

V. Structuring Intersectional Discrimination: Alexander's Caste System

As legal scholar Michelle Alexander demonstrated in *The New Jim Crow: Mass Incarceration in the Era of Colorblindness*, the United States has maintained a racial caste system through the criminalizing and overpolicing of racialized communities.[216] A structural, intersectional approach highlights how racism is intermingled with sexism, capitalism, cis-heteronormativity, and xenophobia.[217] Combined, the structured caste system functions to keep non-ideal survivors of sexual violence and wrongfully-convicted men of color at the bottom of the caste.[218]

A. *Race and Sex Discrimination*

Race and rape have a longstanding relationship.[219] White slave owners used rape as a means of increasing capital since the doctrine of *partus sequitur ventrem* that legalized the one drop rule—the belief that one drop of Black blood made a person Black—and made slavery inheritable by race through motherhood, ensuring that any children born as a result of the rape of enslaved women would be slaves as well.[220] For the majority of United States history, the rape of Black women was not a crime.[221] Similar situations and logics replicated sexual violence against Indigenous, Latinx, Asian, and other racialized women.[222] One such logic is the hypersexualization of women of color where nonconsensual sexual contact toward a woman of color is reconceived of as consensual or "asked for" from "perceived" libidinous signals.[223]

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216. *See* Alexander, *supra* note 8.

217. *See id.*

218. *See id.*

219. *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 8–10 (2006).

220. *See id.*; *see also* Jennifer L. Morgan, *Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery*, 22 Small Axe 1, 1–17 (2018) (citing —Laws of Virginia, 1662 Act XII: "Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother—*Partus Sequitur Ventrem*.").

221. *See* Pokorak, *supra* note 219, at 8.

222. *See Racism and Rape*, Nat'l All. to End Sexual Violence, https://endsexualviolence.org/where_we_stand/racism-and-rape/ [https://perma.cc/H5HC-YREB] (last visited Dec. 17, 2021).

223. *See* Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech L. Rev. 147, 168 (2017) ("[In] the words of a Columbia University, African American, female student: 'I feel unsafe at times. I feel that a lot of the stereotypes that come along with being black—we're

With all of the stereotypes, logics, and legacies of legally-sanctioned sexual violence against women of color, women of color's chances of having their nonconsensual sexual experiences reported as crimes at all is diminished.[224] As Yung established, the majority of police officers subscribe to the ideal victim myth and have racial biases.[225] Therefore, many officers relabel rape against non-ideal survivors as consensual sex, causing thousands of complaints to go uninvestigated.[226]

Officers are also a key demographic of perpetrators of sexual violence, particularly against women of color.[227] Though "the true numbers of accused officers are likely even higher," the Bureau of Investigative Journalism in 2023 reports that "[p]olice officers are being accused of rape at a rate of one a week. Over the past five years more than 300 officers have been reported for rape and 500 for sexual assault. Only ten of those accused of sexual assault have been convicted. The vast majority–350–are still working for the police."[228] The fact that women of color who survive sexual violence from police are expected to report this violence to the very institution that houses their perpetrators instills a clear sense that justice under the law is doomed from the start.[229] Furthermore, qualified immunity continues to protect officers from accountability for misconduct like sexual harassment and assault.[230]

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exoticized and hypersexualized—make me feel targeted a lot.'"); *see also* Melissa V. Harris-Perry, Sister Citizen: Shame, Stereotypes, and Black Women in America, 33–35 (2013) (naming the hypersexualization of Black women the jezebel stereotype); *Racism and Rape*, *supra* note 215 ("Popular media in this country continue to perpetuate racial stereotypes, particularly about women of color. Portraying black women and Latinas as promiscuous, American Indian and Asian women as submissive, and all women of color as inferior legitimates their sexual abuse.").

224. *See* Yung, *supra* note 155.

225. *See id.* at 209–10 ("Research shows police believe 'rape myths' at a much higher rate leading to widespread distrust of rape victims.").

226. *See id.* at 210.

227. *See* Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 Wm. & Mary J. Women & L. 39, 69–76 (2017) (presenting research that sexual offenses were the second-most-frequent incidences of police misconduct after excessive force and that the Department of Justice's research indicates high levels of sexual assault against women of color); *see also* Ritchie, *supra* note 41, at 19.

228. Sarah Haque & Meirion Jone, *One Police Officer Accused of Rape Every Week*, The Bureau of Investigative Journalism (June 15, 2023), https://www.thebureauinvestigates.com/stories/2023-06-15/one-police-officer-accused-of-rape-every-week/ [https://perma.cc/Y29G-TN9Z].

229. *See* Jacobs, *supra* note 227, at 42. ("Can any woman who is raped by the police, much less a Black woman, report that rape to the police?").

230. David G. Maxted, *The Qualified Immunity Litigation Machine:*

Other legal actors like prosecutors, judges, and juries reinforce racist discrimination against women of color survivors.[231] For example, prosecutors seldom take cases involving survivors who do not meet the winning formula—the ideal victim.[232] In general, white women's testimony is more frequently believed than the testimony of women of color, and white women garner more sympathy and favorability from the jury, especially when the alleged perpetrator is not white.[233]

B. *Gender, Sexual Orientation, and Sex Discrimination*

Racism is not the only marginalizing factor for survivors seeking justice.[234] Survivors who are not cisgender or heterosexual are further unidealized within the cis-heteronormative criminal justice system.[235] According to legal scholar Joan W. Howarth, heteronormativity is the systematic way in which heterosexuality is considered the norm and superior to other sexual orientations.[236] Though distinct, gender identity/expression and sexual orientation are often cast together under the umbrella of cisheteronormativity

Eviscerating the Anti-Racist Heart of S 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives, 98 Denv. L. Rev. 629, 630 (2021) (describing how the burden shifts to the survivor to prove qualified immunity does not apply by establishing that the officer caused them to suffer a constitutional violation clearly enumerated in case law which is difficult since sexual violence case law is generally unsupportive of survivors)

231. *See, e.g.*, UK Ctr. for Rsch. on Violence Against Women, *supra* note 182.

232. *See id.* (noting that white women survivors were more likely to prevail at trial and therefore more likely to have a prosecutor take her case); *see also* Pokorak, *supra* note 219, at 7 ("White women victims are overvalued and women of color who are raped are undervalued. This means that Black women are less likely to have their cases prosecuted and perpetrators of sexual assaults on Black women will more likely escape punishment.").

233. *See* Lave, *supra* note 189, at 234 ("One study found that jurors recommend a significantly harsher sentence when the victim is white as opposed to black. In a recent study, Beichner and Spohn found that prosecutors are more likely to file aggravated rape cases when the victim was white and the offender was black.").

234. *See, e.g.*, Matt Kellner, *Queer and Unusual: Capital Punishment, LGBTQ+ Identity, and the Constitutional Path Forward*, 29 Tul. J. L. & Sexuality 1, 4–5 (2020).

235. *See id.*; *see also* James Hampton, *Homosexuality: An Aggravating Factor*, 29 Tul. J. L. & Sexuality 25 (2019) (citing queerness as a discriminatory basis for injustice against queer survivors).

236. *See* Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to* Lawrence, 5 Nev. L. J. 260, 260 (2004) (defining heteronormativity as "the complex social, political, legal, economic and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality.").

that Howarth aptly identifies as hegemonic in the United States criminal justice system.[237]

According to legal scholar Matt Kellner, the United States' legal mistreatment of queer people began with the legalized murder of sodomizers and later evolved into the criminalization of same-sex conduct as well as the denial of rights to same-sex marriage, fostering, and adoption.[238] While legal victories like *Lawrence v. Texas* and *Obergefell v. Hodges*—which made anti-sodomy laws unconstitutional and permitted gay marriage, respectively—have improved the rights and protections of queer people, anti-queerness and cisheteronormativity are still pervasive in American society and have a direct influence on survivors' pursuit of justice in the criminal justice system.[239]

One reason queer survivors seldom reach the end of Yung's sex crime funnel is the long history of criminalizing their gender identities or sexual orientations.[240] Legal scholar James Hampton notes that queer people were often cast as sexual predators.[241] Hampton identifies prosecutors as the primary source of this archetype, using queerness as a tool to prejudice a jury against queer defendants.[242]

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237. For the purposes of this Article, queer discrimination and cisheteronormativity apply to genderqueer and nonheterosexual people, but distinctions within these broad categories are made when relevant. This Article distinguishes between gender identity/expression and sexual orientation, but because both are involved in the LGBTQIA+ community, this Article uses the term cisheteronormativity to describe the discriminatory forces operating against all LGBTQIA+ members. In fact, scholars like Matt Kellner outline these two domains of discrimination under the general category of antiqueerness. *See* Kellner, *supra* note 234, at 4 ("From its earliest days, American criminal law has enforced harsh regulations of sexuality and gender expression. Even before homosexuality was understood as an independent category, colonial rules deemed queer conduct a capital offense.").

238. *See id.* at 4–21 (noting that "the Court has yet to decide whether the Equal Protection Clause alone or federal civil laws, protects queers *as a group*").

239. Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015) (overruling the *Bowers* decision).

240. *See id.*; *see also* Hampton, *supra* note 235.

241. *See* Kellner, *supra* note 234, at 32.

242. *See id.* ("[Prosecutors] use this predetermined storyline [that being gay meant 'living outside the appropriately gendered heterosexual norms'] to show how a gay defendant's appearance and behavior was not in compliance with the 'accepted social order' . . . [prosecutors create] a narrative that homosexuals are dangerous, violent, sexual predators . . . to evoke fear, anger, and anxiety from a jury.").

Queer people of color face further discrimination.[243] For example, Black lesbians Wanda Jean Allen and Lisa Coleman were both sentenced to death for murder despite strong evidence that their races and sexual orientations were referenced prejudicially at trial.[244] One of Coleman's attorneys stated that Coleman was convicted because her identity made her an easy target: "The state singled Lisa out and figured some way to get her the death penalty because she was black, a lesbian, and an easy target . . . ."[245]

Even when incarcerated, the predator narrative persists, as shown in *DiMarco v. Wyoming Department of Corrections*.[246] In *DiMarco*, transwoman Miki Ann DiMarco was viewed as dangerous and put in solitary confinement just for having anatomy that did not conform to cisheteronormative standards.[247] The Tenth Circuit Court held that DiMarco's solitary confinement did not violate the Fourteenth Amendment because she was a unique prisoner who posed a potential risk to other inmates and because she had the opportunity to voice her concerns every ninety days.[248] Specifically, the court found that "DiMarco might be a risk if introduced to the general population of the prison [because] many of the women confined in the prison were victims of sexual assault. Some might be fearful of DiMarco, even though she functioned as a woman . . . ."[249] This case simultaneously acknowledges the prevalence of sexual violence against women while blaming the prevalence of sexual violence on one of the communities most likely to be a survivor themselves—transwomen. The 2015 United States Transgender Survey Report found that transwomen are far more likely to be

243. *See* Coker, *supra* note 223, at 162–63. According to the Department of Justice's Campus Climate Survey Validation Survey in 2016, lesbians reported rates of sexual violence at comparable rates to heterosexual females, while bisexual students reported rates of substantially higher rates of sexual violence. Similarly, the National Intimate Partner and Sexual Violence Survey in 2010 found that 17 percent of heterosexual women, 13 percent of lesbians, and 46 percent of bisexual women reported experiencing sexual violence. This numbers increased noticeably for queer survivors of color. *See id.* at 164.

244. *See* Hampton, *supra* note 235, at 34–36.

245. *See id.* at 36 ("The state singled Lisa out and figured some way to get her the death penalty because she was black, a lesbian, and an easy target . . . . What she's really guilty of is being a black lesbian.").

246. 473 F.3d 1334 (10th Cir. 2007).

247. *See id.* at 1337–38.

248. *See id.* at 1343–45.

249. *See id.* at 1342 ("DiMarco might be a risk if introduced to the general population of the prison. Many of the women confined in the prison were victims of sexual assault. Some might be fearful of DiMarco, even though she functioned as a woman . . . .").

survivors than perpetrators of sexual violence.[250] An estimated 50 percent of transgender people have experienced sexual violence, and these numbers are especially high for transgender people of color.[251]

Queer peoples' chances of experiencing sexual violence increase by 266 percent when they are placed in custody compared to cisheteronormative arrestees.[252] In *City of Chicago v. Wallace Wilson and Kim Kimberley*, police arrested and sexually harassed transwomen Wilson and Kimberley for dressing in women's clothing.[253] The court found that the officers were not protected from their misconduct by an Illinois ordinance against cross-dressing because Wilson and Kimberley were told to cross-dress as part of their pre–sex-confirmation surgery therapy.[254] However, the existence of anti-cross-dressing ordinances and the prevalence of police-led sexual violence demonstrate a larger national pattern of using sexual violence as a means of punishing queer people for their queerness.[255]

Relatedly, cases like *Diamond v. Owens* demonstrate that transgender individuals experience high rates of sexual violence within prisons, and that there are few legal protections afforded to them.[256] In *Diamond*, transwoman Ashley Diamond was denied hormone therapy, which she had been receiving for over seventeen years, and was gang raped with no support from prison administration.[257] Rather than protecting her, administrators first blamed her for being assaulted, then moved her to a new prison where she was raped again.[258] As trans legal scholar Jillian Todd Weis states, the practice of victimizing and punishing queer people reinforces

250. *See Statistics: LGBTQIA+*, *supra* note 34 (finding that at least "24% of American Indian transgender students, 18% of multiracial transgender students, 17% of Asian transgender students, and 15% of Black transgender students have experienced sexual assault").

251. *See id.*

252. *See id.* ("Those who self-identify as queer have a 266% greater chance of experiencing sexual assault while in custody compared to their heterosexual peers."); *see also* Michael J. Griffin, *Intersecting Intersectionalities and the Failure of the Law to Protect Transgender Women of Color in the United States*, 25 Tul. J. L. & Sexuality 123, 134–35 (2016).

253. *See* 75 Ill.2d 525 (1978).

254. *See id.* at 527.

255. *See* Shaw v. District of Columbia, 944 F. Supp. 2d 43 (D.C. 2013) (detailing how a transwoman who had fully transitioned was arrested on three occasions and still placed with other men in a holding cell where she was repeatedly physically, sexually, and verbally harassed).

256. *See* 131 F. Supp. 3d 1346 (M.D. Ga. 2015).

257. *See id.*

258. *See id.*

a gender caste system in which transgender people are legally oppressed rather than protected.[259]

C. *Political Status and Data Discrimination*

Non-American citizen status, criminal statuses as currently or formerly incarcerated, and indigeneity all function as gatekeeping mechanisms against politically-marginalized survivors. For example, a noncitizen survivor of sexual violence is nearly three times more likely to be deported than she is to have her abuser convicted.[260] Undocumented and immigrant women experience sexual and domestic violence at nearly three times the national average rate.[261] For 65 percent of these survivors, their abusers also delayed or held hostage immigration paper filings that the survivors needed.[262] The precarity of their political statuses and the fear of deportation has led to a national decline in the already low reporting rates among noncitizen survivors.[263]

According to legal scholar Natsu Taylor Saito, xenophobia legitimizes racist, discriminatory treatment of racialized, ethnic minority communities through the binary lens of the United States national identity versus alleged foreigners.[264] The criminal justice

259. *See* Jillian T. Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & Sexuality 123, 132 (2001) ("[Transgenderness] is [purportedly] a corrupt form which should be legally suppressed in favor of the 'naturalness' of heterosexuality . . . . This forcible compliance or excommunication is designed to repress nonheterosexual paradigms."); *see also* Griffin, *supra* note 252, at 131 ("[T]he longer the federal government remains inactive when it comes to transgender issues, the more discrepancies will be created in the patchwork of state laws between states that do and do not afford transgender citizens protections.").

260. *C.f. Scope of the Problem: Statistics supra* note 26 *with* TRAC Immigration, *Ten-Fold Difference in Odds of ICE Enforcement Depending Upon Where You Live* (Last Visited April 11, 2019), https://trac.syr.edu/immigration/reports/555 (showing a national 2.5 percent chance of an abuser being prosecuted and incarcerated compared to a 6.9 percent national-average chance of deportation).

261. *See* Nat'l Org. for Women, *Intimate Partner Violence and Immigrant Women!* (June 2017), https://now.org/wp-content/uploads/2017/06/Learn-More-IPV-and-Immigrant-Womenpdf.pdf (last accessed Nov. 01, 2023) ("Abuse rates among immigrant women are as high as 49.8%.").

262. *See id.* (noting that 72.3 percent of those abused never file, and that of the 27.7 percent who do file, they delay filing for an average of 3.97 years).

263. *See* Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*., N.Y. Times (June 3, 2018), https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html [https://perma.cc/XNU5-VTBK].

264. *See* Natsu T Saito, *Why Xenophobia?*, 31 Berkley La Raza L.J. 1, 1, 6 (2021) ("Here, I use the term xenophobia to reference both attitudes and actions that construct individuals and peoples as outsiders—often racialized

system is built on this binary logic, which "incite[s] or excuse[s] ideological or physical attacks on those deemed outsiders . . . [and] facilitate[s] the otherwise unlawful exclusion or removal or these groups or individuals from particular physical locations."[265] Immigration law utilizes expansive plenary power to exclude non-citizens and limit their access to legal remedies like judicial review and habeas corpus.[266] These ground legitimate concerns for non-citizen or ethnic-minority survivors that they are more likely to be perceived as a criminal themselves and unworthy of justice under American laws.

The perceived or actual criminality of a survivor runs counter to the innocence of the ideal victim and therefore is one of the quickest ways for a non-ideal survivor to be denied justice.[267] For survivors of color, racism creates a link between melanin and assumed aggression, danger, and criminality.[268] Similarly for currently or formerly incarcerated survivors, their criminal records render them unrape-able or unworthy of justice because they lack the innocence of the ideal victim.[269]

Finally, indigeneity is a political status in the United States that regularly gatekeeps Indigenous survivors from access to full American criminal justice resources. Indigenous women are nearly three times as likely to be sexually assaulted than women of any other community in the United States.[270] What is particularly significant is the fact that 96 percent of sexual violence against Indigenous women has been perpetrated by nonnatives.[271] Compounding these figures, Native women themselves are disproportionately incarcerated. Native women represent approximately 0.7 percent of the United States female population and yet are 2.5 percent of the

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outsiders—and then use that construction (i) to exclude them from benefits associated with an insider status that is often correlated, accurately or not, with a national or statist identity.").

265. *Id.* at 6.

266. *See*, *e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

267. *See* Brenner et al., *supra* note 147.

268. *See* ALEXANDER, *supra* note 8. Alexander focuses on men of color, but as scholars like Harris-Perry and Ritchie note, women of color, especially Black women, are also subjected to these racist stereotypes. *See, e.g.*, *id*.; HARRIS-PERRY, *supra* note 223; RITCHIE, *supra* note 41.

269. *See* Brenner et al., *supra* note 147.

270. *See Statistics: Race & Indigenous*, *supra* note 38.

271. *See* André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings From the National Intimate and Sexual Violence Survey*, NCJ Number 249736, NAT'L INST. JUST. (May 2016).

population of incarcerated women.[272] To reiterate, Native women experience some of the highest rates of sexual violence and are simultaneously one of the most overincarcerated communities. This statistical reality is parallel for Native men—and presumably non-binary Natives who are seldom identified in research reports—who also experience both high rates of sexual violence and overincarceration.[273]

Despite these offered statistics, the reality of sexual violence for non-ideal survivors is underrepresented. Data collection itself is another mechanism of discrimination against non-ideal survivors.[274] For all of these communities, there is limited data on their experiences, and this data limit has federal funding ramifications.[275] As the United Nations Human Rights Office of the High Commissioner notes, a lack of data on particular communities "means that, for example, when the government or the state is doing its budgeting, there are one category of people who are left out" of allocation decisions.[276]

Prior to the start of the 2006 MeToo social movement that spread awareness of sexual violence on a global scale through social media and storytelling, the main sources of data on sexual violence were from the Department of Justice and the National Intimate Partner and Sexual Violence Survey, both of which focus on college students, a demographic that is predominantly white and upper-middle class.[277] While the MeTooMovement intentionally seeks data on non-ideal survivors, there is still a gap of information for non-ideal survivors compared to ideal survivors.[278] For example, Indigenous

272. *See* Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, Prison Pol'y Initiative (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday [https://perma.cc/WEF4-RSLN].

273. *See id.*; *see also* Rosay, *supra* note 271.

274. *See* Griffin, *supra* note 252, at 129–36.

275. *See* Randall Waechter & Van Ma, *Sexual Violence in America: Public Funding and Social Priority*, 105 Am. J. Pub. Health 2430, 2430–37 (2015) (noting that there is a general underfunding of efforts to prevent sexual violence, but that increased statics on prevalence do help bring efforts for funding forward).

276. U.N. Hum. Rts. Off. of the High Commissioner, *Better Data Collection Bolsters Human Rights of Marginalised People* (Feb. 16, 2022), https://www.ohchr.org/en/stories/2022/02/better-data-collection-bolsters-human-rights-marginalised-people [https://perma.cc/2JZJ-CCAZ].

277. *See* Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey: 2015 data brief – updated release*, CDC (2018) https://www.nsvrc.org/sites/default/files/2021–04/2015data-brief508.pdf.

278. *See generally*, *Statistics*, MeTooMovement, https://metoomvmt.org/learn-more/statistics [https://perma.cc/A5UQ-43EM] (last visited June 17, 2024).

women experience some of the highest rates of sexual violence of any community, but there is little statistical support aside for this general fact other than from the occasional government report.[279]

Additionally, intersectional data in general is rarely presented, and as Crenshaw identified, such single-axis frameworks presumptively privilege certain embodiments over others. Even when such data exists, many communities are regularly left out, such as disabled and neurodivergent survivors, survivors experiencing homelessness, and elderly survivors.[280] If not left out, data curation can conflate communities into single datapoints, such as sexual violence against trans, nonbinary, and genderqueer people, which makes advocacy work for any of these communities even more difficult.[281]

VI. Justice for Women, Justice for All: Solutions to Wrongful Convictions of Men of Color for Sexual Violence

Current solutions to the widespread issue of wrongful convictions are limited to single actor bias and misconduct toward men of color suspects.[282] These solutions range from small-scale increases in documentation and recording of officer interaction with suspects to larger policy reforms.[283] While helpful mitigators in some respects, these solutions are more akin to treating the symptoms of a disease that took hold much sooner in the process through the criminal justice system's mistreatment of non-ideal survivors. This Article presents current solutions, followed by alternative strategies that address a root cause: mistreatment of survivors of sexual violence.

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279. *See Statistics: Race & Indigenous*, *supra* note 37 ("Indigenous women are nearly three times as likely to experience sexual assault than any other ethnic group in the U.S."); *see also* Eve Tuck & K. W. Yang, *Decolonization is not a metaphor*, 1 Decolonization: Indigeneity, Educ. & Soc'y 1, 22 (2012) (noting that data erasure is not coincidental, but an intentional "move to innocence").

280. *See e.g.*, *Better Data Collection Bolsters Human Rights of Marginalised People*, *supra* note 276 (noting the impact of including intersex people for the first time in Kenya's 2019 census).

281. The National Sexual Violence Resource Center has a single infographic about sexual violence against trans and nonbinary people, but the graphic does not distinguish between these two communities. *See Sexual Violence & Transgender/Non-Binary Community*, Nat'l Sexual Violence Res. Ctr., https://www.nsvrc.org/sites/default/files/publications/2019–02/Transgender_infographic_508_0.pdf (2019).

282. *See* Jochnowitz & Kendall, *supra* note 66 (identifying key actors who often contribute to wrongful convictions as eyewitnesses, police, forensic laboratories, prosecutors, juries, and judges).

283. *See id.*

A. *Present Solutions*

To prevent witness misidentification, some police departments have adopted policies for eyewitness identification that standardize lineup procedures, interview methods, and other investigative processes to curb police or survivor bias against men of color.[284] Specifically, these policies include: (1) using a lineup administrator who does not know who the suspect is, (2) offering standard, correct instructions to the eyewitnesses, (3) properly choosing fillers or other lineup members who do not help suggest the police's main suspect, and (4) recording the lineup process and the witness's stated confidence level in an identification.[285] Following these practices can reduce misconduct and the chances that a survivor will misidentify a given suspect as the perpetrator.[286]

While these are easier policy changes to implement than addressing the kinds of misconduct that occur during police interrogations, some solutions to address interrogation misconduct have been proposed.[287] One proposed solution is to mandate that all interrogations be recorded.[288] Recording interrogations, wearing body cameras, and preserving documentation of officer interactions with suspects could reduce the prevalence of misconduct and these bad practices.[289] No rule of this sort exists, but this solution is, in theory, promising.[290]

According to misconduct scholar Klara Stephens, because bad practices are not considered misconduct, the statutory solutions aimed at protecting citizens against officer misconduct do not easily apply.[291] For example, the Police Misconduct Provision states that law enforcement conduct, as a pattern or practice, is unlawful when it deprives an individual of constitutional legal rights.[292] Coercive

284. *See* Gross et al., *supra* note 67, at 164–65.

285. *See id.* at 164.

286. *See id.* at 165.

287. *See id.* ("These are affirmative reforms. They set terms for conducting [witness] interrogations and lineups correctly, and reduce misconduct along the way. A crackdown on deliberate misconduct—witness tampering, for example, or concealing exculpatory evidence—might be harder to implement.").

288. *See id.* at 148.

289. *See id.*

290. *See id.* ("No such rule exists anywhere in the United States, but it's technologically feasible.").

291. *See, e.g.*, 18 U.S.C. § 242 (West); 34 U.S.C.A. § 12601 (West) (formerly codified as 42 U.S.C. § 14141).

292. *See* 34 U.S.C. § 12601 (West) (formerly codified as 42 U.S.C. § 14141) ("It shall be unlawful for any government authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws

behavior like forced self-incrimination is a clear Fifth Amendment violation, as *Miranda* concretized, but conduct such as feeding a suspect details about a case that leads to a false confession is not an obvious deprivation of a constitutional right.[293] As the title of the provision suggests, the conduct against which it aims to protect is police misconduct, so bad practices that lead to wrongful convictions are not designed to be prevented under this provision.[294] Similarly, the Deprivation of Rights Statute protects against violations of constitutional rights, but bad practices that contribute to false confessions and wrongful convictions are not a clear violation of constitutional rights.[295]

These statutes not only protect against violations of constitutional rights through officer misconduct, but also do not address underlying racism of officers that disproportionately impacts suspects of color.[296] In 1964, Congress attempted to address this issue through Title VI of the Civil Rights Act, declaring unlawful any officer conduct that is discriminatory on the basis of race, color, or national origin.[297] While helpful in some respects, Title VI often focuses on individual conduct rather than systemic forms of discrimination, such as the influence that the Bestial Black Man myth has on officers' tendencies to view men of color as suspects.[298]

Scholars like Thorne Clark propose a race-conscious police misconduct statute that seeks to address subtle and systemic instances of racism that contribute to wrongful convictions.[299] Among the components of the proposed statute, Clark suggests assigning specific duties to officers for proper treatment of suspects and evaluating officer conduct in relation to racial prejudice.[300] This

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of the United States.").

293. *See* Stephens, *supra* note 86, at 617.

294. *See id.*

295. *See* 18 U.S.C. § 242 (West) ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race . . . shall be fined under this title or imprisoned not more than one year or both.").

296. Hence, in 1964, Title VI of the Civil Rights Act was ratified to protect against discriminatory officer conduct. *See* 42 U.S.C. § 2000d (West).

297. *See id.*

298. *See* Duru, *supra* note 48, at 1320.

299. *See* Clark, *supra* note 94.

300. *See id.* at 1637 (including "(1) safeguards preventing government entities from escaping liability through qualified immunity . . . (3) requirements for self-evaluation and modification internal to the police misconduct statute itself; [and] (4) an assignment of affirmative duties to police to ensure that

solution is promising if the statute were to be widely and properly implemented, though the statute lacks additional requirements to address implicit bias and subconscious discrimination amongst officers who exercise Stephens's bad practices.[301] Perhaps the most powerful component of Clark's proposed race-conscious statute is the requirement that judges be required to take race into account when they consider the case and the suspects' interactions with officers.[302] Finally, separating forensics labs from police precincts and mandating that rape kits be tested are current, plausible remedies to these problems that often lead to wrongful convictions of men of color.[303]

B. *Proposed Solutions: From Minor Reforms to Comprehensive, Systemic Change*

Increasing incarceration is not the best solution as this will only exacerbate over-policing and disproportionate incarceration of Black, Indigenous, and people of color (BIPOC). However, so long as incarceration remains the main method the criminal justice system utilizes for protecting survivors from their assailants, solutions that increase accurate incarceration of perpetrators are worth considering.[304] Presently, few alleged perpetrators are being incarcerated, and those who are incarcerated are not always the perpetrators.[305] Increasing accuracy for perpetrator prosecution is the kind of bare-minimum response the present punitive system should provide. While semi-race-conscious solutions like Title VI of the 1964 Civil Rights Act, Clark's race-conscious police misconduct statute, and demands for proper witness procedures may mitigate racial bias against suspects, these solutions are essentially treating symptoms of an earlier disease— discrimination against non-ideal survivors. Without ensuring justice for all survivors, the cases that could lead to proper conviction of white perpetrators and prevent the wrongful conviction of men of color are never considered, leaving a gaping flaw in our justice system.[306]

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persons apprehended are cared for properly when taken into custody.").

301. *See id.*

302. *See id.* ("[T]he statute should effectuate a race-conscious approach by including: (7) a judicial obligation to take the race of the plaintiff into account when considering interactions with the police.").

303. *See* Gross et al., *supra* note 67; *see also* Kalar et al., *supra* note 208; Fulton, *supra* note 167.

304. *See supra* Part I.

305. *See Scope of the Problem*, *supra* note 26 (stating that 60 percent of sexual violence perpetrators are white men, but that 60 percent of sexual violence exonerees are men of color).

306. *See, e.g.*, Simon McCarthy-Jones, *Survivors of Sexual Violence Are*

1. Police Reform

The most obvious and commonly sought solution for wrongful convictions is police reform.[307] Reform proposals range from extensive racial bias training to ending qualified immunity, police demilitarization, and, perhaps, defunding the police.[308] Skeptics argue that racial bias training does little to address actual officer bias, but having training be a permanent feature of officers' duties could start to convey an effort to the public that might create some trust between survivors and officers.[309] If non-ideal survivors trusted officers to believe and protect them, then the white perpetrators, who represent 60 percent of all perpetrators, would be more likely to be properly pursued and investigated.[310] Furthermore, because non-ideal survivors are less likely to misidentify a suspect due to race in the way that white women frequently misidentify their assailants as men of color, men of color are less likely to be wrongfully identified as suspects when officers investigate non-ideal survivors' cases.[311]

Ending qualified immunity would create accountability for officers who discriminate against, and even commit sexual violence against survivors, and who discriminate against suspects who are men of color.[312] When officers who exhibit patterns of discrimination against non-ideal survivors are allowed to keep their jobs, they are likely to continue this pattern and extend it toward treatment of

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Let Down by the Criminal Justice System – Here's What Should Happen Next, The Conversation (Mar. 29, 2018), https://theconversation.com/survivors-of-sexual-violence-are-let-down-by-the-criminal-justice-system-heres-what-should-happen-next-94138#:~:text=The%20starting%20place%20for%20improvement,legal%2C%20psychological%20and%20advocacy%20support [https://perma.cc/8PZ2-JC3D].

307. *See* Jay Jenkins, *George Floyd and the Connection to Houston: A Call for Local Reform*, 1 Hous. L., 21, 23 (2020).

308. *See id.*; *see also* Black Lives Matter, *BLM Global Network Foundation Launches Campaign to Stop Militarization of Police* (Apr. 20, 2021), https://blacklivesmatter.com/blm-global-network-foundation-launches-campaign-to-stop-militarization-of-police [https://perma.cc/UAJ7-UYHQ].

309. *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419 (2016).

310. *See* RAINN, *Perpetrators of Sexual Violence: Statistics*, https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/6VL3-JBHQ] (last accessed June 17, 2024).

311. *See*, *e.g.*, Joseph A. Vitriol et al., *Racial Bias Increases False Identification of Black Suspects in Simultaneous Lineups*, 10 Soc. Psych. & Personality Sci. 722, 722 (2019) ("[A]mong Whites, racial bias, as a function of both individual differences and contextual cues, can increase the false identification of Black faces in simultaneous lineups.").

312. *See* Maxted, *supra* note 230, at 646–57 (explaining the racist origins of qualified immunity).

suspects in lineup design and interrogation tactics.[313] Considering that both the police and the prison system are supposed enforcers of justice and are a primary sources of sexual violence against non-ideal survivors, survivors are not just denied justice through this system but are in fact the system's main victims.[314] Ending qualified immunity would be a step in the right direction toward establishing officer accountability.[315]

Demilitarizing or defunding the police are more radical reforms that would be more difficult to implement, but are still worth considering.[316] Modern, armed policing evolved from slave patrols designed to keep Black people subordinated.[317] This initial design has hardly changed. Presently, governments spend billions on law enforcement, much of which is allocated to militarized equipment.[318] Activists argue that not only does enhanced weaponry tend to increase violence, but that this funding could be spent on violence-prevention programs run by local communities.[319] This proposal is not speculative; economic investment in high-crime neighborhoods instead of increased policing has proven effective.[320] For example, the Peacemaker Fellowship in Richmond, California saw an annual decline in gun-related deaths by 55 percent when the city traded policing for investment in citizens' futures.[321] Furthermore, when the Price School of Public Policy evaluated the costs and benefits of the Peacemaker Fellowship, researchers determined that the program was less expensive than traditional policing

313. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 606 (2021).

314. *See* Griffin, *supra* note 252; *see also* Ritchie, *supra* note 41.

315. *See* Wylie Stecklow, *Qualified Immunity: Is the End Near?*, 93 N.Y. St. Bar J. 22, 24 (2021).

316. *See, e.g.*, Black Lives Matter, *supra* note 308.

317. *See* Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer [https://perma.cc/PML2-6BAG] (noting that state and local governments spend over $100 billion annually on law enforcement, especially for militarized equipment).

318. *See id.*

319. *See id.*

320. *See* Sheryll Cashin, White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality 191–99 (2021) (recounting the work of DeVone Boggan, which drastically reducing gun violence in the city of Richmond through a community-lead, unpoliced, preventative program).

321. *See id.* at 197 ("A peer-reviewed independent study facilitated by the School of Public Health at UC Berkeley found that the Peacemaker Fellowship program was associated with a 55% annual reduction in gun-related deaths.").

methods by over $535 million.[322] Diverting funds from the police and toward citizens and community-based programs can reduce crime and overall costs for states.[323]

2. Mandatory Rape Kit Testing

Non-ideal survivors and wrongfully convicted people of color are both harmed by sexual assault myths and biases that emerge in law enforcement's treatment of rape kit testing.[324] Rape kits are both the most probative form of evidence to substantiate a survivor's claims and the most valuable tool for exoneration.[325] And yet, ideal victim myths often lead to officers discarding rape kits.[326] Absent this evidence, wrongfully convicted men of color lack access to the evidence most likely to exonerate them.[327] Furthermore, by addressing discrimination against non-ideal survivors that prevent their kits from being tested, innocent men of color are less likely to be suspects in the first place, since their DNA would not match.[328] Thus, a simple solution to preventing wrongful convictions of men of color for sexual violence is to mandate that all rape kits get tested.[329]

3. Changing Discriminatory Legal Standards

Another way to prevent race-based wrongful convictions for sexual violence is to change the legal standards that perpetuate the ideal victim myth and thereby prevent non-ideal victims from rightfully convicting the white perpetrators who often escape conviction. For example, the reasonably foreseeable standard in tort law treats sexual violence like a rare aberration, which leads to few survivors ever recovering from employers. This also means that employers are not forced to make systemic changes that would decrease both tolerance of and opportunity for sexual violence in the workplace.[330]

322. *See id.*

323. *See id.* ("According to an independent evaluation conducted on the Sacramento Peacemaker Fellowship Program, modeled on Richmond's, for every dollar invested Sacramento received eighteen to forty-one dollars in benefits due to costs avoided through violence reduction.").

324. *See* Fulton, *supra* note 167 (explaining that non-ideal survivors' rape kits are seldomly tested due to police officer bias in not believing the survivors).

325. *See* Fulton, *supra* note 167.; s*ee also supra* Subpart IV.B (explaining how the majority of rape kits are not tested decide their high probative value).

326. *See* Fulton, *supra* note 167; s*ee also supra* Subpart IV.B.

327. *See* Fulton, *supra* note 167; s*ee also supra* Subpart IV.B (explaining that because most exonerations come from DNA, rape kits are the only, and therefore the best link to ensuring rightful convictions).

328. *See* Fulton, *supra* note 167; s*ee also supra* Subpart IV.B.

329. *See supra* notes 302–306.

330. *See* Chamallas, *supra* note 195 (explicating how holding employers vicariously liable for sexual assault rarely happens because of biased legal

By modifying or eliminating this standard for monetary recovery for sexual violence, the legal system would accurately reflect the reality that sexual violence is prevalent and foreseeable.[331] Additionally, the myth that only men of color are prone to sexual violence would falter with the recognition that sexual violence is widespread rather than aberrant or only perpetrated by men of color.[332] One reason that the myth that men of color are hypersexual and violent survives is that sexual violence is still legally recognized either as an unforeseeable moment or due to a particular propensity for a particular person.[333] The historical characterization of men of color as having a propensity for sexual violence by nature leads to a dynamic in which a wrongfully accused man of color is far more likely to be convicted than a white man who does not face such a stereotype.[334] Thus, changing the legal standard for vicarious liability in sexual violence cases would help more survivors recover monetarily, would compel employers to make systemic changes to instill safer working environments, and would mitigate the myth of sexual predation that plagues men of color.[335]

Additionally, legal standards that permit commentary on survivors' demeanors and behaviors at the time of filing perpetuate the ideal victim myth that keeps non-ideal survivors from winning their cases, especially against white defendants.[336] Many jurisdictions still allow admission of evidence about the survivor's demeanor such that the more hysterical a survivor is, the more believable she becomes to a jury.[337] The demand of this performance also has an counter-implication—survivors who do not appear upset or display the right kind of emotions are less believable.[338]

For Black women, the stereotype of the Angry Black Woman compounds the problem because a Black female survivor who behaves in a more upset or distressed fashion is more likely to be

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standards that perpetuate the ideal victim myth that survivors are immediately hysterical).

331. *See Statistics*, *supra* note 34; *see also Statistics*, *supra* note 37; *New Data - Sexual Assault Rates Doubled*, *supra* note 158; Smith et al., *supra* note 268.

332. *See* Haney-Caron & Fountain, *supra* note 47, at 711.

333. *See* Chamallas, *supra* note 195, at 137 ("Many courts continue to treat sexual abuse cases as exceptional . . . ."); *see also* 28 U.S.C.A §§ 413–415 (West 2011) (stating that prior crimes or acts of sexual violence may be used as evidence to show that a defendant has a propensity for sexual violence which the defendant acted in accordance with at the time of an incident before trial).

334. *See* Duru, *supra* note 48.

335. *See id*.

336. *See*, *e.g.*, Commonwealth v. King, 445 Mass. 217 (2005).

337. *See id.*

338. *See id.*

interpreted as angry and animalistic than as a credible survivor.[339] Similarly, for queer and formerly or presently incarcerated survivors, the stereotype that they themselves are dangerous and predatory means that their demeanors are more likely to be interpreted as threatening and, therefore, less credible.[340] By removing or modifying legal standards like the fresh complaint doctrine, the influence of racial, gendered, sex-based, and political stereotypes against survivors dwindles. As a result, more non-ideal survivors' testimonies are viewed as credible, and rightful convictions would ensue.[341]

4. Improved Statistical Research

The methods by which data is collected and presented have a huge impact of the perception of an issue like sexual violence.[342] According to Indigenous scholars Eve Tuck and K. Wayne Yang, the lack of data on sexual violence is not a coincidence as settler colonialism deliberately excludes communities like Indigenous people from research studies that might otherwise highlight the harms and challenges they face.[343] Tuck and Yang call this particular method of self-preservation the "a(s)te*risk peoples" move to innocence.[344] This move considers Indigenous people either at risk of extinction, or the asterisk in statistics, indicating that there is not enough data to include them in research studies.[345] As a result, Indigenous survivors are erased from the narrative of sexual violence, a narrative that often dictates where funding and aid goes.[346] Likewise, when surveys lump together the meager statistics on transgender, nonbinary, and other genderqueer survivors, the combined statistics not only reinforce a false general perception that they form

339. *See* Harris-Perry, *supra* note 223.

340. *See generally* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Penn. L. Rev. 1 (2017).

341. *See id.*

342. *See* Griffin, *supra* note 252, at 129–36; *see also* Waechter & Ma, *supra* note 275.

343. *See* Tuck & Yang, *supra* note 279, at 22.

344. *See id.* ("This settler move to innocence is concerned with the ways in which Indigenous peoples are counted, codified, represented, and included/disincluded by educational researchers and other social science researchers.").

345. *See id.* ("As 'at risk' peoples, Indigenous students and families are described as on the verge of extinction, culturally and economically bereft . . . [a]t the same time, Indigenous communities become the asterisk peoples, meaning they are represented by an asterisk in large and crucial data sets, many of which are conducted to inform public policy that impact our/their lives.").

346. *See id.*; *see also* Waechter & Ma, *supra* note 275.

a homogenous community, but also make it more difficult for the statistics to draw attention to each community's experiences more difficult.[347]

Moreover, the data on sexual violence is further limited because sexual violence is the most underreported crime type.[348] With limited data, the myth that sexual violence is unusual—as the foreseeability standard suggests—perpetuates harm against survivors who must then surmount lofty legal standards to recover monetarily.[349] Those who do report tend to be ideal survivors because there is greater trust between these survivors and law enforcement.[350] This correlation creates the appearance that sexual violence affects ideal survivors more than non-ideal survivors. In other words, non-ideal survivors experience sexual violence at significantly higher rates, but this information is scattered, limited, and sparse.[351]

For example, one of the largest surveys on sexual violence was conducted at colleges, meaning the demographics for the survey skewed toward the super-majority group who is able to attend college: white, upper to middle-class straight women.[352] Limited data on non-ideal survivors means these survivors have fewer tools to bolster their credibility, and fewer resources are spent on these communities.[353] Sexual violence as a whole needs to be better documented. By doing so, its prevalence and perpetrators become more visible in the criminal justice system.[354]

5. Systemic Anti-Discrimination Work

Women of color structural feminist scholarship contends that without comprehensive structural change, minor reforms will only trigger adaptations in a system otherwise designed to perpetuate

347. *See Sexual Violence & Transgender/Non-Binary Community*, *supra* note 281.

348. *See* Benner, *supra* note 158.

349. *See* Chamallas, *supra* note 195, at 137.

350. *See*, *e.g.*, Nat'l Inst. Just., *Race, Trust and Police Legitimacy* (Jan. 9, 2013), https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy [https://perma.cc/MWN6-ERFH] (finding that white people are more likely to trust police than communities of color).

351. *See supra* Subparts V.B–C.

352. *See* Benner, *supra* note 158.

353. *See* Tuck & Yang, *supra* note 279, at 22; *see also* Waechter & Ma, *supra* note 275.

354. *See* Tuck & Yang, *supra* note 279, at 11, 22. (noting that the sparse data on the prevalence of sexual violence is part of colonialism); *see also* Waechter & Ma, *supra* note 275 (noting generally the low amounts data on the prevalence of sexual violence).

white cis-heteropatriarchal settler privilege.[355] Shifting away from a punitive carceral system and toward a restorative, community-centered justice model supports survivors and prevents wrongful convictions.[356] As Indigenous scholar Sarah Deer stated, the United States criminal justice system's treatment of sexual violence perpetuates colonial violence against Indigenous sovereignty.[357] Enhanced community sovereignty through restorative, structural justice models shifts the focus to survivors' healing rather than exacting punishment that the United States system regularly converts into wrongful incarceration of men of color.[358]

Even the rightful conviction of perpetrators of color can harm BIPOC communities by perpetuating cycles of poverty and myths of hypersexuality. Therefore, the best solutions for preventing wrongful convictions of sexual violence involve prevention measures against sexual violence in the first place. These solutions refuse reliance on an adaptive system designed to perpetuate the kind of caste system Alexander describes. Instead, supporting local grassroots organizations and investing in BIPOC community infrastructure can decrease the prevalence of sexual violence without infringing on BIPOC autonomy.[359]

Conclusion

With so few non-ideal survivors' cases leading to sexual violence convictions, the majority of these convictions occur when the survivor is an ideal victim.[360] In the ideal victim scenario, the survivor is a white woman assaulted by a man of color.[361] Thus, men of color are wrongfully convicted, white male perpetrators evade conviction, and non-ideal survivors are not protected from their predominantly white male perpetrators.[362] Women of color have,

355. *See* Ruíz y Flores, *supra* note 16; *see also* Alexander, *supra* note 8, at 14–15, 36; Bierria & Kim, *supra* note 27; Deer, *supra* note 30.

356. *See* Bierria & Kim, *supra* note 27; *see also* Deer, *supra* note 30.

357. *See* Deer, *supra* note 30.

358. *See id.*

359. *See* Cashin, *supra* note 320, at 191–99; Sara's House/Place, https://www.sarashouse.org [https://perma.cc/4MFP-3A8T] (last visited June 17, 2024) (supporting Black and Brown women survivors of domestic and/or sexual violence, especially young or expecting mothers experiencing homelessness, in Detroit, Michigan through professional development workshops and community baby showers that function as means for breaking the cycle of violence).

360. *See* Brenner et al., *supra* note 147.

361. *See id.*

362. White men represent approximately 60 percent of all perpetrators of sexual assault. *See* RAINN, *supra* note 310.

in some ways, already recognized the interdependent relationship that wrongful convictions for sexual violence have with discrimination against survivors of sexual violence.[363] For example, Ida B. Wells, a formerly-enslaved woman, lobbied for antilynching legislation because she knew that sexual violence was used as a weapon against her entire community.[364] Black women were being raped by white men, while white men were accusing Black men of rape of white women and killing them for it.[365] This interdependent relationship speaks to the fact that addressing the issue of wrongful sexual violence convictions requires also addressing the issue of discrimination against survivors.[366] Both problems are rooted in a weaponization of sexual violence to maintain a discriminatory caste system.[367]

According to the heralded Black Feminist Combahee River Collective, "[i]f Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression."[368] To apply this proposition broadly to the issue of wrongful sexual violence convictions, if non-ideal survivors were to experience full justice without being locked into an intersectionally discriminatory caste system, this justice would necessitate the destruction of all forms of discrimination that contribute to the frequent wrongful conviction of men of color. Thus, to address the issue of disproportionate wrongful convictions of men of color, advocates must take an intersectional, structural justice approach and address the broader issues facing non-ideal survivors.[369]

363. *See* Mobley, *supra* note 54.

364. *See id.*

365. *See id.*

366. *See id.*

367. *See supra* Part IV.

368. *See* Combahee River Collective, *supra* note 140, at 22–23.

369. *See* Simon McCarthy-Jones, *supra* note 306 ("And yet, all [these small legal system reforms] may still be unsuccessful if we don't remove from society the myths and prejudice that surround sexual violence. This is work for everyone.").